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No. 1023 (October Term, 1940).

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Duly Authorized Representative of James Foster and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S STATEMENT, SPECIFICATION OF ERRORS AND ARGUMENT.

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Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S STATEMENT, SPECIFICATION OF ERRORS AND ARGUMENT.

OPINIONS BELOW.

The oral opinion, findings of fact, conclusions of law, and written opinion of the District Court of the United States for the Dallas Division of the Northern Judicial District of Texas may be found at R. 276-290. The written opinion of said District Court is reported in 33 F. Supp. 244.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit may be found at R. 301-303, and is reported in 118 F. (2d) 328.

JURISDICTION.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, U. S. C. A., Title 28, Section 347. The judgment of the United States Circuit Court of Appeals for the Fifth Circuit sought to be reviewed was entered March 4, 1941 (R. 304). A petition for a rehearing was filed March 24, 1941, within the time provided by the rules of said Circuit Court of Appeals (R. 305), and the petition for a rehearing was denied April 2, 1941 (R. 310).

The petition for a writ of certiorari was filed in this court May 5, 1941, and was granted October 13, 1941.

STATEMENT OF THE CASE.

This suit was instituted by petitioner, who had been duly designated as agent and representative of certain redcap employees of the respondent at its passenger terminal in Dallas, Texas, pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, by filing a complaint in the District Court of the United States for the Dallas Division of the Northern Judicial District of Texas, to recover for said redcaps unpaid minimum wages alleged to be due them under Section 6 (a) of said act, together with an equal amount as liquidated damages and attorney's fees.

For more than thirteen years the redcaps had been employed by respondent, receiving no wages, but depending solely on tips or gratuities of passengers whom they served. On September 29, 1938, the Interstate Commerce Commission, acting under authority conferred upon it by Section 1, Fifth, of the Railway Labor Act, in a proceeding before it known as Ex Parte 72 (Sub. No. 1), held that redcaps at stations and cities of over one hundred thousand population were employees for the purposes of the

Railway Labor Act (R. 195). Thereafter, on October 11, 1938, all of the redcaps involved in this action, constituting almost all the redcap employees of respondent, and a majority of such employees, executed and delivered to respondent an instrument (R. 139-141) whereby they designated the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as their duly authorized and accredited representative for the purposes of the Railway Labor Act, and authorized said organization to enter into negotiations with respondent for the purpose of making a working agreement covering their conditions of employment, and to do all other things in connection therewith having for its purpose the making and maintaining of an agreement between respondent and said redcaps. On the same date petitioner herein, who is General Chairman of said Union Terminal System Board of Adjustment, wrote respondent's vice-president and general manager (R. 141-143) advising him of the ruling of the Interstate Commerce Commission holding that redcaps were employees for the purposes of the Railway Labor Act, and of the fact that the redcaps had authorized the Union Terminal System Board of Adjustment to represent them in the making of a working agreement as contemplated by the Railway Labor Act, and that they were, therefore, serving notice upon respondent of the action of the employees, and were advising the respondent that they were prepared to exhibit to it the authorizations that were executed by the redcaps, and were asking for a conference under the terms of the Railway Labor Act for the following purposes: (1) to exhibit to respondent the authorizations executed by the employees authorizing said board of adjustment to act for the redcaps, and (2) for the purpose of negotiating an agreement covering their working conditions and other related subjects. This letter

concluded with a request that petitioner be advised of the time, date and place that would be agreeable to respondent to hold a conference for the aforesaid purposes.

Respondent did not answer this letter of petitioner, but on October 22, 1938, served upon each redcap employed by it a notice (R. 127) reading as follows:

"Dallas, Texas, October 22, 1938.

"To: Redcaps,
The Union Terminal Company.

"In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such service.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938 compensation which, together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service and the accounting required.

"The Union Terminal Company,
By Murrell L. Buckner,
Vice-President & Gen. Manager."

The redcaps did not reply individually to this notice, but petitioner, as their representative, wrote a letter to respondent's vice-president and general manager October 24, 1938 (R. 128-130), protesting against the arrangement sought to be imposed by respondent set forth in the notice of October 22, 1938. This letter reads as follows:

"The Union Terminal Company System Board of
Adjustment Brotherhood of Railway
and Steamship Clerks,
A. J. Pickett, General Chairman,
709 Equitable Building,
St. Louis, Mo.

"October 24, 1938.

"Mr. Murrell L. Buckner,
Vice-President and General Manager
The Union Terminal Company,
Dallas, Texas.

"Dear Sir:

"I have a copy of a circular issued by your Company dated at Dallas, Texas, on October 22, 1938, and which was handed to each employee to whom it was addressed: i. e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he receives in tips from the public and which information the carrier intends to employ, in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act:

"In other words, the carrier contemplates crediting tips and other moneys paid to its employees by persons other than itself to relieve itself of the obligations imposed by the following quoted section of the law:

"'Fair Labor Standards Act:

"'Section 6-(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"'(1) during the first year from the effective date of this section, not less than 25 cents an hour.'

"The above section of the law which is quoted in part for the purpose of this notice, clearly sets forth that every employer who engages in commerce shall pay to each his employees during the first year after the effective date of the law 25 cents per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby.

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under the said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the Administrator, we are accordingly filing this notice of protest, for the reasons set forth herein.

Yours truly,

(Sgd.) A. J. Pickett,

General Chairman."

Thereafter petitioner and respondent's general manager conferred with a view of negotiating a working agreement covering the redcaps employed by respondent. During the period covered by these conferences respondent's vice-president, under date of December 6, 1939, wrote a letter (R. 153, 154) to petitioner referring to a proposed agreement and stating "as I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day is in the Court, and as soon as same is decided, we will be glad to negotiate an agreement with the Clerks' Union of which you are the general chairman for the company." A working agreement was finally entered into between respondent and the Brotherhood of Railway and Steamship Clerks,

effective January 1, 1940, rule 16 of which (R. 134) provided that if a redcap was improperly suspended or dismissed, and after a hearing was reinstated, he should be reimbursed for any money losses suffered, provided that it was subsequently determined that under the provisions of the Fair Labor Standards Act the carrier was required to pay a wage to the redcap over and above any amounts that might be received by him as tips. Testimony was introduced to the effect that from October 22, 1938, to the date of the trial, the redcaps at no time withdrew their protest against the arrangement described in respondent's notice of October 22, 1938 (R. 199 and 206).

During the period from October 24, 1938, to February 28, 1939, each of the redcaps reported daily on a form furnished by respondent the amount of tips he had received, and respondent twice each month paid, in every case where the tips reported did not equal the minimum wage provided by the Fair Labor Standards Act, the difference between the tips reported and the minimum wages earned during the preceding half month. **During the period from March 1st to October 15th, 1939, the redcaps, pursuant to instructions of respondent, did not report their tips** (R. 130), but respondent advised them that it would assume, unless reported to the contrary, that for each work period after February 28, 1939, each redcap collected in tips at least an amount equivalent to the number of hours worked multiplied by 25 cents, and that should any redcap receive less than that amount during any work period, he should report it to respondent, and respondent would pay any difference between the amount of tips collected and the amount produced by multiplying the number of hours worked by 25 cents, and that each of said redcaps should fill in a form showing the hours worked during the day for each day worked. It was agreed that during this period each redcap collected in tips during each work period

an amount equal to or in excess of the number of hours worked during the work period multiplied by 25 cents (R. 131). From October 16, 1939, to March 6, 1940, the day preceding the filing of this suit, each redcap reported daily the tips he received, and where the tips received during any work period were less than the minimum wages earned, respondent paid the difference between the tips and the minimum wages (R. 131, 132).

Judgment was entered by the District Court in favor of petitioner and against respondent (R. 39, 41) for unpaid minimum wages in the sum of $38,626.99, liquidated damages in an equal amount, and attorney's fees in the sum of $500.00, totaling $77,753.98. The District Court based its decision on the grounds (a) that the payment of tips by the public to the employee of another was a gift to that employee, and in the absence of any contract between the employee and employer that such tips should be the property of the employer, they remained the property of the employee, and (b) that a gratuity paid by the public to the employee of an employer cannot be a compliance with a plainly worded statute which requires the employer to pay the employee a certain sum. The Court referred to petitioner's letter to respondent's vice-president and general manager, dated October 24, 1938, the letter of this official dated December 6, 1939, and rule 16 of the working agreement of January 1, 1940, and held that under these circumstances there was no meeting of the minds of the parties on the terms of respondent's notice of October 22, 1938, and that, consequently, the notice did not effect any change in the existing arrangement between the parties; that, therefore, the tips remained the property of the redcaps, and could not be considered payment of wages by respondent (R. 286-290).

The Circuit Court of Appeals for the Fifth Circuit in a majority opinion written by Judge Sibley and concurred in

by Judge Foster (R. 301) followed its opinion in the case of Williams v. Jacksonville Terminal Company, 118 F. (2) 324, decided by it the same day, and reversed the judgment of the District Court, and remanded the cause for further consistent proceedings (R. 304). The Court reasoned that it did not appear that the moneys collected by the redcaps were personal gifts and not compensation for the service which respondent hired them to perform, and that no contract was necessary to make the tips the money of the respondent; that although they did not agree to the plan stated in respondent's notice of October 22, 1938, they did continue to work and collected money for their services and accounted for it as required, and that the law intervened to make respondent owe them a stated wage for those services, and in consequence, to deprive them of the tips which previously were their compensation. The Court held that petitioner's argument that the former arrangement, though not a formal collective agreement, ought to be held unchangeable by the employer alone, could not be sustained; both because there was no collective agreement that the tips should belong to the redcaps, and because a collective agreement would not avail against changes wrought by a statute.

Judge Holmes, dissenting, held that the word "tip" should be given its usual and ordinary meaning, and that if what the redcaps received were gifts or gratuities, they had the right to keep them for themselves, and that if Congress had intended that tips should be included in the meaning of the word "wages" it would have said so.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that the tips received by the redcaps were not personal gifts to the redcaps, but were compensation for services which respondent hired them to perform, so that no contract was necessary to make the tips the property of respondent.

2. In holding that the Fair Labor Standards Act had intervened to make respondent owe the redcaps a stated wage, and in consequence to deprive them of the tips which the Court said were previously their compensation.

3. In holding that even though a majority of the redcaps had designated a representative under the Railway Labor Act for collective bargaining purposes, and a conference had been requested of respondent by said representative to negotiate a working agreement for said redcaps, respondent by unilateral action on its part and without exerting every reasonable effort, as required by Section 2 of the Railway Labor Act, to make an agreement with the redcaps, could effect a change in the existing arrangement under which the tips belonged to the redcaps so as to appropriate said tips for the payment of the minimum wage.

4. In holding that respondent's notice to the redcaps was sufficient to make the tips received by them the money of respondent, as said notice did not claim ownership of the tips, but merely offered to pay any difference between the minimum wages and the tips received on the theory that tips were wages under the Fair Labor Standards Act.

5. In holding that the accounting and guarantee plan was a compliance with the Fair Labor Standards Act because the plan will not carry out the purposes of Congress,

since it permits of easy evasion of the obligations imposed thereby, shifts the burden of keeping records from the employer to the employee, although Section 11 (c) of the Act requires the employer to keep records necessary to show compliance with the act, and is conducive to labor disputes burdening and obstructing commerce.

6. In failing to hold that in the absence of an agreement to the contrary, tips received by the redcaps were their property, and were not under the Fair Labor Standards Act wages paid by respondent, and that there was no agreement between the parties that the tips should be the property of respondent, and hence judgment in favor of petitioner should have been affirmed.

SUMMARY OF THE ARGUMENT.

I.

The tips received by the redcaps in the absence of a contract between them and respondent providing that the tips would be the property of respondent were the property of the redcaps.

Polites v. Barlin, 149 Ky. 376, 41 L. R. A. (n. s.) 1217, 149 S. W. 828;
Zappas v. Roumeliote, 156 Iowa 709, 137 N. W. 935;
McRae v. McBeath, 5 N. B. 446;
Booker v. Pennsylvania Railroad, 82 Pa. Super. 588;
Powers Case, 275 Mass. 515, 176 N. E. 621;
Harrison v. Kansas City Terminal Railway Company, 36 Fed. Supp. 434, l. c. 439.

The Fair Labor Standards Act did not affect the ownership of the tips so as to make them the property of respondent.

II.

Under the arrangement existing when respondent's notice of October 22, 1938, was served on the redcaps, they had the right to retain all tips received. This arrangement was never changed despite respondent's notice because (a) the redcaps did not accept the accounting and guarantee plan, but, on the contrary, protested against it, and the parties by their conduct thereafter recognized that there had never been a meeting of the minds thereon, and (b) respondent could not by its unilateral action effect a change in the arrangement in view of the redcaps' previous designation of a representative for collective bargaining purposes, and request for a conference to negotiate a collective agreement under the Railway Labor Act

without first exerting every reasonable effort to make an agreement with said representative.

Virginian Railway Company v. System Federation No. 40, 57 Sup. Ct. 592, 300 U. S. 515, 81 L. Ed. 789;

Railway Labor Act, Section 2, 45 U. S. C. A. 152.

III.

Even if it should be held that the accounting and guarantee notice became a part of the employment contract of the redcaps, nevertheless, the notice did not effect any change in the ownership of the tips received by the redcaps after that date so as to make them the property of respondent, which could be used by respondent to pay wages to the redcaps, as the respondent did not by said notice claim ownership of the tips, but said notice was merely an assertion by respondent of its opinion that tips were wages under the Fair Labor Standards Act, and that it was only bound to make up the difference between the tips received and the minimum wages earned.

IV.

Congress in using the language "Every employer shall pay to each of his employees engaged in commerce • • • wages" at certain rates, expressed its intention that a direct wage payment from the employer should be the means of carrying out the purposes of the act. Its purpose will be defeated if the accounting and guarantee plan is held to be a compliance with the act.

(a) One of the purposes of the act is to eliminate unfair competition in commerce by reason of one employer paying substandard wages to his employees, while another who competes with him pays a higher wage.

Title 29, U. S. C. A., Sec. 202.

This purpose will not be carried out if defendant is per-

mitted to obtain the labor of the redcaps without paying wages therefor, while another employer must pay his employees wages.

(b) The accounting and guarantee plan will not carry out the intention of Congress, since it permits of easy evasion of the duties imposed thereby.

(c) The purpose of the act is not carried out by the accounting and guarantee plan because it shifts the burden of keeping records from the employer to the employee, although section 11 (c) of the act requires the employer to keep the records necessary to show compliance with the act.

> Section 11 (c), Fair Labor Standards Act of 1938 [Title 29, U. S. C. A., Section 211 (c)].

(d) The accounting and guarantee plan will not carry out the purpose of the act since it is conducive to labor disputes burdening and obstructing commerce.

Since the duty of the employer under the act to pay each of his employees engaged in commerce wages at the minimum rates is plain, there is no occasion for construction.

> United States v. Missouri Pacific Railroad Company, 49 Sup. Ct. 133, 278 U. S. 269, 72 L. Ed. 322;
>
> Russell Motor Car Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778;
>
> Albert and J. M. Anderson Manufacturing Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778.

V.

Even if the Court should hold that the accounting and guarantee notice became a part of the employment contract of the redcaps and that the plan was a compliance with the Fair Labor Standards Act, the plan was abandoned by respondent during the period from March 1, 1939,

to October 15, 1939, during which period the redcaps were instructed by respondent not to report their tips, and hence petitioner is at least entitled to recover wages and liquidated damages for this period.

VI.

Tips received by an employee are not wages paid by the employer and may not be considered in determining whether the employer has complied with the Fair Labor Standards Act.

Sections 6 and 3 (m) of the Fair Labor Standards Act of 1938 [29 U. S. C. A., Sections 206 and 203 (m)];

Roberts v. Frank Carruthers and Bros., 202 S. W. 659, 661;

Gay v. Hudson River Electric Power Company, 178 Fed. 499, 503;

Moore v. Heaney, 14 Md. 558;

Ford v. St. Louis etc. Railway Company, 54 Iowa 728, 7 N. W. 126, 128;

Massie v. Cenna, 28 L. R. A. (n. s.) 1108, 239 Ill. 352, 88 N. E. 152;

Colver v. Foster Screen Company, 99 N. J. Eq. 734;

La Juett v. Coty Machine Company, 272 N. Y. S. 822;

First National Bank of Wilkes-Barre v. Barnum, 160 Fed. 245;

Booker v. Pennsylvania Railroad Co., 82 Pa. Super. 588;

Alexander Hamilton Hotel Corporation, Prosecutor, v. Board of Review of the New Jersey Unemployment Compensation Commission et al., Defendants, decided by the Supreme Court of New Jersey, September 16, 1941, being case No. 208 for the January Term, 1941.

Decisions of the courts holding tips to be earnings of an employee for the purposes of Workmen's Compensation Acts are not in point for the reason that said acts use

broader terms, such as "earnings" or "remuneration," instead of the narrower term "wages," and for the further reason that compensation acts must be construed so that employees will get the benefit of tips received from their employment in order to carry out the purposes thereof, while it is not necessary to include tips as wages in order to carry out the purposes of the Fair Labor Standards Act.

Lloyd Casualty Co. v. Merodith, 63 S. W. (2d) 1051;
Penn v. Spiers and Pond, Ltd., 1 King's Bench Law Reports 766, l. c. 769.

VII.

Respondent's argument that the tips received by the redcaps were its property is based on its contention that the tips were its charges to the donors thereof for services rendered them by the respondent through the redcaps. The tips cannot be considered charges made by the respondent since they are not uniform in amount, and no tariff authorizing the respondent to receive the same has been filed with the Interstate Commerce Commission, and the charge would be unlawful under Sections 2 and 6, Paragraph 7 of the Interstate Commerce Act.

Title 49, U. S. C. A., Sections 2 and 6, Paragraph 7;
Stopher v. Cincinnati Union Terminal Company, Inc., Case No. 28,495, decided by the Interstate Commerce Commission June 25, 1941.

VIII.

Since Section 6 of the Fair Labor Standards Act requires the minimum wages to be paid by the employer, the employee may not by contract waive his rights under the act and agree that his wages may be paid by tips which are his own property.

City of Glendale v. Coquat, 52 Pac. (2d) 1178;
Larsen v. Rice, 100 Washington 642, 171 Pac. 1037;
Holden v. Hardy, 169 U. S. 366, 397.

ARGUMENT.

I.

ON THE QUESTION OF THE OWNERSHIP OF THE TIPS IN THE ABSENCE OF AN AGREEMENT.

The Tips Received by the Redcaps in the Absence of a Contract Between Them and Respondent Providing That the Tips Would Be the Property of Respondent Were the Property of the Redcaps. The Fair Labor Standards Act Did Not Affect the Ownership of the Tips so as to Make Them the Property of Respondent.

The Circuit Court of Appeals for the Fifth Circuit in deciding this case and the case of Williams et al. v. Jacksonville Terminal Company, 118 F. (2d) 324, in which the principal opinion was written, ignored the accounting and guarantee plan almost entirely, holding that no consent of the redcaps was necessary to make the tips received by them the property of the terminal companies, since the tips were not gifts or gratuities, but were compensation for services performed by the companies through the redcaps, and hence the tips were the property of the companies irrespective of the consent of the redcaps. The Court further held in the case at bar (118 F. [2d], l. c. 328) that "The law had intervened to make the company owe them (the redcaps) a stated wage for those services, and in consequence to deprive them of the tips which previously were their compensation," and that even if there had been a collective agreement and the tips would belong to the redcaps, it "would not avail against changes wrought by a statute." The vital question is, as the Circuit Court of Appeals said in the Williams case (118 F. [2d], l. c. 215), "Whose money were the tips?"

Judge Holmes in his dissenting opinions in these cases

held, in effect, that the word "tip" should be given its usual and ordinary meaning, that of a gift or gratuity, and that being gifts or gratuities, the redcaps had the right to retain the tips for themselves. He was of the opinion that tips were not compensation for service, but rather, gifts or gratuities, because whatever moral compulsion one may have been under to tip redcaps, pullman porters, or other employees, there was no legal obligation to do so during the period involved. He agreed with District Judge Atwell, who had rendered judgment in favor of the redcaps in the Dallas case, that (33 F. Supp. 247):

> "The payment of tips by the public, to the employee of another, is a gift to that employee, and in the absence of any contract between the employee and employer that such tips shall be the property of the employer, they remain the property of the employee."

Judge Merrill E. Otis in the case of Harrison v. Kansas City Terminal Railway Company, 36 F. Supp. 434, l. c. 439, also agreed with the contention of the plaintiff in that case that in the absence of an agreement on the part of an employee to turn over his tips to his employer, tips received by the employee are the property of the employee. He decided against the redcaps in that case, however, refusing to follow the opinion of Judge Atwell in the case at bar saying that it was distinguishable on the facts from the Kansas City case. The difference in the two cases was that in the case at bar the redcaps protested against the accounting and guarantee arrangement and did not agree to the terms thereof, so that the trial judge found that there was no meeting of the minds on the terms of the accounting and guarantee notice, while in the Kansas City case there was no protest against the plan, and no question about its having been accepted by the redcaps.

The dissenting opinions of Judge Holmes, the opinion of Judge Atwell and the opinion of Judge Otis followed the

only previously reported cases which hold that, in the absence of an agreement, tips given by customers to an employee belong to the employee. These cases are collected in a note in 13 A. L. R. 924:

> "The only cases which have been found on the question whether tips given by customers to an employee belong to him, or his employer, hold that the employee is entitled thereto. Thus in Polites v. Barlin (1912), 149 Ky. 376, 41 L. R. A. (N. S.) 1217, 149 S. W. 828, it was held that an employee who, under a mistake as to his rights, turned over to his employer the tips given him by customers for his personal use, might compel the employer to return them to him.
>
> "And in Zappas v. Roumeliote (1912), 156 Iowa 709, 137 N. W. 935, it was held that a minor working in a shoe-shining emporium under a salary contract was entitled to the tips which were personal gifts to him from the patrons of the house, in the absence of a contract that they should belong to his employer, and that he could recover them back when paid to the employer by mistake.
>
> "In M'Rae v. M'Beath (1847), 5 N. B. 446, a stagecoach driver, and not his master, was held entitled to money given to the driver by the owner of a horse which was led behind the coach on one of its trips, the money being regarded as a mere gratuity to the driver for his trouble in looking after the horse."

The Iowa Supreme Court in the Zappas case, supra, said:

> "We think the Court was right in instructing that plaintiff would be entitled to any gifts in the way of tips over and above the regular charge for the service performed, given to him by patrons of defendant's place; and that **the burden of proof was on the defendant to show an agreement on the part of plaintiff to turn the tips over to him.**" (Emphasis ours.)

In the case of M'Rae v. M'Beath, supra, decided by the Supreme Court of New Brunswick, a stagecoach driver

sued his employer for wages due him. The defendant attempted to set off a gratuity given the driver by the owner of a horse which was led behind the coach on one of its trips. The Court held that the trial court had not erred in instructing the jury "that the plaintiff was not bound to account to the defendant for the money received for taking care of the horse which was led behind the stage, which might be considered as a mere gratuity from the owner of the horse." The defendant argued that whatever profit the employee derived from the employment belonged to the master, but the Court refused to adopt this view.

It will thus be seen that the majority opinions of the Circuit Court of Appeals in the Jacksonville and Dallas cases are in conflict with the previously decided cases holding that tips are the property of an employee in the absence of a contrary agreement.

The majority opinions in the Jacksonville and Dallas cases proceed on the theory that since the tips would not have been given the redcaps unless they performed a service for the donors, the tips are essentially compensation for services rendered by the terminal companies through the redcaps and not gifts, and hence are the property of the terminal companies. Judge Holmes, dissenting, however, takes the position that the tips were gifts since there was no legal obligation to tip at all. The majority opinions ignore the fact that in the case of every gift there is in a non-legal sense a consideration, that is, a reason for its being made, whether it be love, affection, a past favor, or a desire on the part of the donor to favor the donee, but it is the absence of a **legal** consideration which the courts have in mind when they say a gift implies want of consideration. The courts have held that a tip is a gift or gratuity not founded on any legal consideration. Thus, in Booker

v. Pennsylvania Railroad, 82 Pa. Super. 588, the Court said:

> "The money paid by the passenger was not compensation which the porter could have demanded or sued for in an action, but was rather a gratuity or tip which he was not bound to give, and which the porter could not have recovered in an action of assumpsit if the passenger had not seen fit to give it."

And in Powers' Case, 275 Mass. 515, 176 N. E. 621, the Court said:

> "As to each customer of the employer, the tip to the employee was a gift, and not founded on an obligation."

We believe Judge Sibley, in writing the majority opinion of the Circuit Court of Appeals in the case at bar, avoided the accounting and guarantee notice almost entirely because, after recognizing that the tips belonged to the redcaps before October 24, 1938, if he should base respondent's title to the tips on the accounting and guarantee notice, he would have to find some act of the redcaps by which they agreed to transfer the tips from themselves to respondent. This he apparently could not do in view of the trial court's finding that there was no meeting of the minds of the parties on the terms of the notice (R. 277, 280, 288; 33 F. Supp., l. c. 248). He therefore found it necessary to rest his decision solely on the effect of the Fair Labor Standards Act itself and not on any consent of the redcaps. He therefore said (R. 302, 118 F. [2d], l. c. 328):

> "The law had intervened to make the company owe them a stated wage for those services, and in consequence, to deprive them of the tips which previously were their compensation. * * * a collective agreement would not avail against changes wrought by a statute."

We believe this conclusion to be unsound. There is no provision in the act which purports, or which by necessary operation serves, to deprive any employee of property which he would otherwise own. If tips were the property of the redcaps before the Act, the Act alone could not make them the property of the terminal companies. The Circuit Court of Appeals relied on the fact that the Act imposed on the terminal companies a duty to pay for services rendered, and that the tips received by the redcaps were compensation for those very services. But the duty imposed by the Act upon the terminal companies to pay wages to the redcaps was not discharged by permitting the redcaps to retain the tips they received from passengers unless the tips were the property of the terminal companies. The Circuit Court of Appeals in the Williams case recognized this when it said (118 F. [2d], l. c. 327): "The Act undoubtedly contemplates that the employee shall be paid his wages by the employer out of the employer's funds." The mere serving of the accounting and guarantee notices by the companies did not make the tips their property where the passengers intended the tips to be the property of the redcaps, and where there was nothing in the notice effecting any change in the ownership of the tips. The accounting and guarantee notice, even if agreed to by the redcaps, could not have prevented the tips when given from becoming the property of the redcaps in the first instance, for the passengers who gave the tips were not made aware of the agreement, and consequently, still intended their gratuities to belong to the redcaps. It is common knowledge that the public gives tips to redcaps as gratuities to them, and not as compensation to the terminal companies. Accordingly, when given to the redcaps, the tip money became their property. Since the tips became the property of the redcaps when given, the accounting and guarantee system amounted at most to an

agreement whereby the redcaps turned over some of their own property to their employer and received that property back from that employer as wages. That is not, we submit, a compliance with the Act. The Act requires the actual payment of a minimum wage, not an agreement that the employer will pay the minimum wage provided the employee gives to the employer, not only his services, but some of his property as well.

We submit, therefore, that the holding of the Circuit Court of Appeals for the Fifth Circuit in the case at bar and in the Williams case that the tips were the property of the terminal companies without the consent of the redcaps, and that no contract was necessary to make them such, is in conflict with the previously adjudicated cases holding that tips are the property of the employee in the absence of an agreement on his part to turn them over to the employer, and that the holding of the Circuit Court of Appeals attributing to the Act the legal effect of changing the ownership of tips from the redcaps to respondent is manifestly unsound and should not be followed.

II.

ON THE QUESTION OF WHETHER THE ACCOUNTING AND GUARANTEE NOTICE BECAME A PART OF THE EMPLOYMENT CONTRACT OF THE REDCAPS.

The Notices Served by Respondent on the Redcaps on October 22, 1938, Did Not Become a Part of the Employment Contract of the Redcaps Because They Protested Against the Proposed Arrangement, and Did Not Accept the Terms of Said Notice, and Because Respondent Could Not Effect a Change in the Working Conditions of the Redcaps by Unilateral Action in View of the Redcaps' Designation of a Representative for Collective Bargaining Purposes, and Their Request for a Conference to Negotiate a Collective Agreement Under the Provisions of the Railway Labor Act Without First Exerting Every Reasonable Effort to Make an Agreement with Said Representative.

The trial court held that the notice of October 22, 1938, delivered by respondent to each of the redcaps employed by it, notifying them that effective October 24, 1938, they would be required to report the tips received by them, and that respondent would guarantee to pay them the difference between the tips reported and the minimum wages provided for by the Fair Labor Standards Act of 1938, did not effect any change in the agreement under which the redcaps had for many years been working, and had been retaining all tips which they received. The court's conclusion was based on its finding of fact No. 4 (R. 280), reading as follows:

> "I find that the redcaps and their employer made no other contract on October 22, 1938, and have not made any since then. That neither the redcaps nor their employer saw fit to sever their former connec-

tions upon the expression of the views of each, as to the applicability of the Fair Labor Standards Act of 1938. That notwithstanding the expression of such views they continued to function together, and continued to recognize that the question of tips and wages was an open one between them."

Respondent criticizes the Court's holding, saying that by continuing to work for respondent, reporting their tips and accepting checks for the small differences between the tips reported and the minimum wages, the redcaps must be conclusively held to have accepted the terms of employment offered by respondent, even though petitioner, as their representative, protested against the proposed arrangement by his letter to respondent dated October 24, 1938. Respondent in its brief filed in the Circuit Court of Appeals cited as authority for its position Shuppan v. Peoria Terminal Railway Company, 30 Fed. (2d) 569, and L. C. Balfour Company v. Brown, 110 S. W. (2d) 104. There are, however, as the trial court observed, important factual differences between these cases and the case at bar, as we shall show, so that said cases are not in point here.

The record shows that for more than thirteen years the redcaps were employed by respondent at its union passenger depot in Dallas, receiving no wages from respondent, but depending solely on tips or gratuities of the passengers whom they served. On September 29, 1938, the Interstate Commerce Commission, acting under authority conferred upon it by Section 1, fifth, of the Railway Labor Act, as amended, in a proceeding instituted before it, known as Ex Parte 72 (Sub-No. 1), held that redcaps at stations in cities of over one hundred thousand population were employees for the purposes of the Railway Labor Act (R. 194). Respondent was notified of this proceeding and filed therein its answer to the questionnaire submitted to it,

in which it denied that the redcaps were its employees (R. 171).

Thereafter, on October 11, 1938, all of the redcaps involved in this action executed and delivered to respondent an instrument whereby they designated the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as their duly authorized and accredited representative for the purposes set out in the several sections of the Railway Labor Act of 1934, as amended, and authorized said organization to enter into negotiations with respondent for the purpose of making a working agreement covering their conditions of employment, and to do any and all other things in connection therewith that would have for its purpose the making and maintenance of an agreement between respondent and said redcaps (R. 189). On the same date petitioner herein, being General Chairman of said Union Terminal System Board of Adjustment of the brotherhood, wrote Mr. Murrell L. Buckner, respondent's Vice-President and General Manager (R. 142), advising him of the ruling of the Interstate Commerce Commission holding that the redcaps were employees for the purposes of the Railway Labor Act, and of the fact that the redcaps had authorized the Union Terminal System Board of Adjustment of the brotherhood to represent them in the making of a working agreement as contemplated by the Railway Labor Act, and that they were, therefore, serving notice upon respondent of the action of the employees, and were advising the respondent that they were prepared to exhibit to it the authorizations they held executed by the redcaps, **and were asking for a conference under the terms of the Railway Labor Act** for the following purposes: (1) to exhibit to respondent the authorizations executed by the employees authorizing said Board of Adjustment to act for the redcaps, and (2) **for**

the purpose of negotiating an agreement covering their working conditions and other related subjects. This letter concluded with a request that petitioner be advised of the time, date, and place that would be agreeable to respondent to hold a conference for the aforesaid purposes.

After the redcaps had designated the Union Terminal System Board of Adjustment as their representative for the purposes of the Railway Labor Act, and petitioner as Chairman thereof had requested a conference for the purpose of negotiating an agreement covering working conditions and other related subjects, it then became the duty of respondent to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes in conference between its representatives and the redcaps' representative under Section 2 of the Railway Labor Act. It was mandatory that respondent do so under the provisions of the first and second paragraphs of Section 2 of the Railway Labor Act (45 U. S. C. A., Section 152), which reads as follows:

> "First. Duty of carriers and employees to settle disputes.
>
> "It shall be the duty of all carriers, their officers, agents, and employees **to exert every reasonable effort to make** and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. (Emphasis ours.)
>
> "Second. Consideration of disputes by representatives.
>
> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference be-

tween representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

This duty was imposed on respondent as a carrier in order to carry out the purpose of the Railway Labor Act to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions, so as to avoid any interruption to commerce, or the operation of any carrier engaged therein. Virginian Railway Company v. System Federation No. 40, 57 S. Ct. 592, 300 U. S. 515, 81 L. Ed. 789.

Under this section of the Railway Labor Act it was the duty of respondent, since the redcaps had selected and designated a bargaining representative and had so informed respondent, and had requested a conference for the purpose of making an agreement with respect to wages and working conditions, "to exert every reasonable effort to make * * *" an agreement "covering rates of pay, rules and working conditions," and respondent was without authority to take unilateral action to prescribe wages and working conditions until such efforts as required by the act had been made. In the Virginian Railway Case, supra, the Supreme Court held squarely that it was the mandatory duty of a carrier-employer to treat with the duly selected and authorized representative of the employees for the purpose of making, if possible, a collectively bargained agreement. After the redcaps had selected a representative for the purpose of collective bargaining and had notified respondent of their desire for a conference for the purpose of negotiating an agreement under the Railway Labor Act, respondent had no choice in the matter and was bound to treat with the men's designated representative. Under the Railway Labor Act it then became the clear, plain and inescapable duty of respondent to "exert every reasonable effort" to make an agreement

"concerning rates of pay, rules and working conditions." Instead of pursuing the course commanded by the act, it flouted the act and undertook by unilateral declaration to prescribe wages and working conditions. This it had no right to do for this plain reason: Implicit in the language prescribing the duty to exert every reasonable effort to negotiate an agreement with respect to wages and working conditions is the denial of the right of the carrier-employer to fix them by unilateral declaration.

After being advised on October 11, 1938, of the men's designation of a representative for collective bargaining purposes and of the men's desire for a conference, respondent undertook to deal with the redcaps individually by serving on each of them eleven days later the notice of October 22, 1938, by which respondent sought to change the existing arrangement under which the redcaps retained their tips by requiring that so much of said tips be applied against the minimum wage which respondent realized it was required to pay these men as employees under the Fair Labor Standards Act of 1938. In so doing it ignored the men's request for a conference for the purpose of negotiating an agreement covering working conditions and other related subjects, and ignored their duly designated representative so far as this desired change in the arrangement under which they had been working was concerned. There was a day when a carrier could by its own fiat dictate wages and working conditions without negotiating with the employees, **but that day ended with the enactment of the Railway Labor Act.** As a matter of fact, the Railroad Labor Board, created by the Railroad Labor Board Act of 1920 (41 Stat. 469) in its decision No. 119, reported in Decisions of the United States Railroad Labor Board, Volume II, page 87, in ordering certain carriers and representatives of their employees to confer in an effort to agree on rules and working conditions, laid down sixteen prin-

ciples with which the rules agreed upon should be consistent (l. c. 95, 96), among which was the following:

> "7. The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. This right of participation shall be deemed adequately complied with if and when the representatives of a majority of the employes of each of the several classes directly affected shall have conferred with the management."

This principle was referred to by Judge Hutcheson, who was then sitting in the District Court for the Southern District of Texas, and is now a member of the Circuit Court of Appeals for the Fifth Circuit, in the case of Brotherhood of Railway and Steamship Clerks etc. v. Texas and New Orleans Railroad Company, 24 F. (2d) 426, thereafter affirmed by this Court on certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, 281 U. S. 548, 74 L. Ed. 1034.

So much for the conduct of the respondent. Let us now consider the conduct of the employees. It must be remembered that they were by command of the Railway Labor Act under the obligation to exert every reasonable effort to make an agreement by negotiation with respondent. They were, in other words, commanded when wages and working conditions were to be considered, or a dispute arose, to stick to their posts, permit the stream of commerce to flow, and negotiate. Recognizing that duty, they selected their negotiator, so advised respondent and invited negotiations, as we have heretofore pointed out.

When respondent served its notice of October 22, 1938, on the individual redcaps (instead of pursuing the course commanded by law), the employees turned the whole matter over to their previously authorized representative, and replied through him—thus conclusively asserting their

willingness and readiness to deal through him as their collective bargaining agent. The representative filed a protest against the action of respondent.

This left the action of respondent unagreed to. There was, as Judge Atwell found, no meeting of the minds. The situation then was in this posture: The employees stood ready and willing to negotiate—urging negotiation in fact. Respondent stood on its unilateral declaration and failed to make any reasonable effort to make an agreement. The employees continued in their jobs, as it was their duty to do, all the while keeping their protest alive and likewise their readiness and willingness to negotiate. They preserved peace in the industry by complying with the demand of respondent for reports of tips received. They accepted payment of part of their wages from respondent, to which they were clearly entitled under the law. Meanwhile, as we have said, they kept their protest and invitation to negotiate alive. There is nothing in all this which can be construed as an acceptance of the accounting and guarantee notice by the redcaps.

Respondent may say that we are relying on Paragraph Seventh of Section 2 of the Railway Labor Act (Par. 7, Sec. 152, Title 45, U. S. Code), which provides that no carrier shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements, except in the manner prescribed in such agreements, or in Section 6 of the Act. We are not, however, relying on this section, as it is designed to protect agreements and conditions established after collective agreements are made. We are here dealing with provisions of the law prescribing the duties of carriers and their employees in the **making** of agreements. Respondent's confusion arises from the failure to recognize the two functions of the Railway Labor Act, which are: (a) to regulate and supervise the **making** of agreements, and (b) to protect and maintain them **after they are made**. Both func-

tions have the same purposes—as declared in the first section of the Act: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (3) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

The first six Paragraphs of Section 2 of the Railway Labor Act (Sec. 152, Title 45, U. S. Code) embody provisions dealing with the **making** of agreements. They command every reasonable effort to **make** agreements. They safeguard the employees in organizing and selecting representatives. They proscribe attempts of the employers to influence or coerce employees in the exercise of these rights.

And here let us say that there could be few more effective ways for an employer to coerce employees into abandoning their organization or their representative than by committing such acts as respondent committed in this case. A carrier, when confronted with negotiations, could easily take such unilateral action as would place the employees at a great disadvantage in their efforts to bargain collectively. Upon these considerations who can deny that it was the clear intent of the Railway Labor Act that wages and working conditions can be changed by an employer only after he has fully complied with the law, and has made every reasonable effort to make an agreement by negotiation with the duly authorized representative of the men. The language of Mr. Justice Swayne in Smythe v. Fiske, 23 Wall. 374, 380, is especially applicable here:

> "A thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law."

The intent of the law-maker, as set forth in the first section of the Railway Labor Act, was to enact a law which would tend to prevent labor controversies and interruptions of commerce. With that intent in mind, who can say that it would not be sheer mockery to leave out of the law the denial of the right of an employer to fix wages and working conditions without first exerting every reasonable effort to make an agreement with respect to them by negotiation with the employees?

Although respondent thus ignored the requirements of the Railway Labor Act, it did recognize by its conduct thereafter that the redcaps had not agreed to the terms of its accounting and guarantee notice, and that the question of whether tips could be considered wages was still unsettled. As Judge Atwell observed in his opinion, the respondent on December 16, 1939, recognized that this question was still an open one between it and the redcaps when Mr. Buckner, its Vice-President and General Manager, addressed the following letter to petitioner (R. 153):

"Dear Mr. Pickett:

"Referring to our conversation and letter which you showed me from Mr. Harrison in reference to the Kansas City Terminal agreement with the Redcaps.

"I have carefully read this agreement and I see nothing in it that is in any way out of line, except that Rule 6 would not apply to this property and Rule 17 is not clear.

"As I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day, is in the Court **and as soon as same is decided we will be glad to negotiate an agreement with the Clerks Union, of which you are the General Chairman for this Company.** (Emphasis ours.)

"Very truly yours,

(Signed) Murrell L. Buckner."

Thereafter a working agreement was entered into between respondent and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, as representative of the redcaps, effective January 1, 1940, in which the question as to whether the redcaps were entitled to be paid a wage in addition to the tips they received was not dealt with, but in which it was recognized that the question as to whether respondent was required to pay a wage in addition to tips was to be determined by the courts. This agreement provided that a redcap who was dismissed or suspended was entitled to a hearing on the charges preferred against him, and that if the charges were not sustained, he should be reinstated. Rule 16 of the agreement so providing contained the following provision (R. 134):

> "The employee shall be reimbursed for any money losses suffered; provided that it is subsequently determined that under the provisions of the 'Fair Labor Standards Act' the carrier is required to pay a wage to the redcap over and above any amounts that may be received by them as tips. (Note.) This rule shall not be construed as requiring the carrier to reimburse redcaps for loss of tips, either now or in the future."

The record shows that after the redcaps had protested against the arrangement proposed by respondent in its notices of October 22, 1938, conferences were held between Mr. Buckner, petitioner and a committee of redcaps in an effort to arrive at a basis for a working agreement between the respondent and the redcaps, but that no effort was made to agree on the question as to whether respondent was entitled to treat tips as wages paid by respondent. During these conferences the men always insisted on their rights under the Fair Labor Standards Act, and at no time withdrew their protests against respondent's proposal contained in the notice of October 22, 1938 (R. 198, 206). Mr. Buckner, respondent's vice-president and gen-

eral manager, who was representing respondent in these conferences, understood the position of the men, but apparently was of the opinion that the railroads were entitled to credit tips against the minimum wages prescribed in the Fair Labor Standards Act, even though there was no agreement between respondent and the men to that effect. Respondent still so contends. Mr. Buckner, therefore, when he wrote petitioner on December 6, 1939, called the latter's attention to the fact that a case was already in court involving the question as to whether the railroads were entitled to credit tips against wages, and that he would be glad to negotiate an agreement with the Clerks' Union when this question was decided. He apparently felt that this question, that is, as to whether tips were wages as a matter of law aside from any agreement of the parties, would have to be decided by the Courts before he could negotiate on the wage question. The statement in Mr. Buckner's letter that "As soon as same is decided we will be glad to negotiate an agreement" is clearly an admission on the part of Mr. Buckner that no agreement had been made between respondent and the redcaps to the date of said letter, for if Mr. Buckner thought that an agreement had been made he would likely have said: "We cannot negotiate on the question as to whether we are entitled to credit tips against wages because the company and the redcaps have already agreed to the terms of the notice served by the company on October 22, 1938, and, therefore, the question is settled." Mr. Buckner did not, however, write petitioner to that effect because he undoubtedly realized that no agreement had been reached in view of petitioner's protest against the company's proposal of October 22, 1938, and the redcaps continued insistence through their representatives that they were entitled to a wage in addition to tips received.

An agreement was, however, finally consummated, effec-

tive January 1, 1940, in which the tips-wage question was not dealt with at all, but was left open awaiting a decision of the Courts, as is evidenced by the provision in Rule 16 providing that if a redcap was improperly dismissed or suspended, and after a hearing was reinstated, he would be reimbursed for money losses suffered, if it was subsequently determined that under the provisions of the Fair Labor Standards Act respondent was required to pay a wage to the redcaps over and above any amounts that they might receive as tips (R. 134). Of course, since there was no agreement between the parties on the notice of October 22, 1938, in the event of a holding by the Courts that absent an agreement tips could not be credited against wages, respondent would be bound to pay the men at the rate prescribed in the act for all time they worked for respondent, but as there might be some question about their right to be reimbursed at said rate for lost time in the event they were reinstated after being improperly dismissed or suspended, Rule 16 was inserted in the agreement to cover this point. Is it reasonable to suppose that the respondent, if it thought that an agreement had been made between it and the men on the terms of the notice of October 22, 1938, would not have insisted that this alleged agreement be incorporated in the written agreement, especially in view of the protest made by the men to the arrangement on October 24, 1938? It was not embodied therein, however, as Mr. Buckner accepted the men's protest against the arrangement as being a rejection thereof by them, and proceeded on the theory that no agreement had been made, but that the company was nevertheless under the law entitled to credit tips against wages even without an agreement.

This is an important respect in which the facts here differ from the facts in the two cases cited by respondent. Shuppan v. Peoria Railway Terminal Company, 30 Fed.

(2d) 569, and L. G. Balfour Company v. Brown, 110 S. W. (2d) 104. In neither of those cases was there any conduct on the part of the employers from which it might be inferred that they accepted the protest made by the employees therein involved as keeping the changes which the employers therein sought to make in the working agreements open for further determination by the Courts. Thus, in the L. G. Balfour Company case, the Court, after quoting plaintiff's letter, which it termed a protest, but which actually was merely a request of the defendant that it allow the same bonus on plaintiff's sales as on salesmen's sales, said that after this letter was written, "In so far as the record shows the **dispute ended there.**" There was no recognition by defendant that any question as to plaintiff's compensation remained open for later settlement as in the case at bar.

So, too, in the Shuppan case, although the employees protested against the proposed reduction in their wages, the company at no time conceded by its conduct or otherwise, that the question was open for further discussion or for the decision of any Court.

Respondent now says that the redcaps had only two alternatives upon being served with the notice of October 22, 1938. They could either accept the terms thereof, or they could leave respondent's employ. We submit that there were several other alternatives, that is, the men could have exercised their right to strike, or could have attempted to settle their differences by negotiation under the terms of the Railway Labor Act, or could have left the question of respondent's right to offset tips against wages open to be determined by a decision of the courts. Respondent had no right to effect a change in rates of pay, rules or working conditions of these men as they existed on and prior to October 22, 1938, without first exerting very reasonable effort to reach an agreement with the men as required by

the Railway Labor Act. It was its mandatory duty under the Railway Labor Act to exert every reasonable effort to settle this dispute in conference between its representative and the representative designated by the men. Until it had in good faith followed the procedure prescribed in the Railway Labor Act, it had no right to attempt to change the working conditions by serving individual notices on the men and treating with them individually. Such action on its part was contrary to both the letter and spirit of the Railway Labor Act.

It is true that this Court, in the case of Virginian Railway Company v. System Federation No. 40, 300 U. S. 515, 81 L. Ed. 789, wherein it held that the carrier might by mandatory injunction be compelled to treat with the duly designated representative of a majority of its employees in a particular craft or class, said that the Railway Labor Act did not preclude such individual contracts as the carrier might elect to make directly with his individual employees. We submit, however, that all the Court meant by this statement was that a carrier is not bound to make any collective agreement, although it is bound in good faith to exert every reasonable effort to do so, and that it may enter into individual contracts with such of its employees as desire to bargain individually rather than collectively. The Court did not say a carrier could, where his employees have designated a representative for collective bargaining purposes under the Railway Labor Act, and said representative has requested a conference for the purpose of negotiating an agreement covering working conditions, ignore such action of the employees, and their expressed desire to bargain collectively, and attempt to effect a change in the working conditions of such employees by serving a notice on them individually, as was done in this case. If a carrier can thus ignore the requirements of the Railway Labor Act, and affect the rates of pay and working

conditions of its employees after they have designated a representative for collective bargaining purposes, and have expressed their desire to deal collectively, by serving notices on those employees who desire to deal collectively rather than individually, it is apparent that the Railway Labor Act will have failed in its purpose.

We find nothing in the case of Illinois Central Railroad Company v. Moore, 112 F. (2d) 951, decided by the Circuit Court of Appeals for the Fifth Circuit and relied on by respondent, which justifies respondent's conduct in attempting to change the working conditions of the redcaps by the service of notices on the individual employees after they had designated a representative for collective bargaining purposes, and a conference for the negotiation of an agreement had been requested. As we understand this case, it merely holds that where there is a collective agreement between a union and a carrier, it is not itself a contract of employment, but is only a basis agreed upon as mutually satisfactory for making contracts of employment. The Court said that in the absence of any special agreement otherwise, every employment may be presumed to be on the basis of a collective agreement and to adopt its terms, but that ordinarily there is nothing to prevent a special agreement, **if an employee desires it.** That is exactly our position here. All we contend is that under the Railway Labor Act an employer must exert every reasonable effort to make a collective bargaining agreement where its employees have designated a representative for that purpose, and have expressed their desire to deal collectively. We do not contend that an employer may not deal individually with those employees **who desire to deal individually.**

Respondent lays great stress on the fact that after it served the notices on the redcaps on October 22, 1938,

the redcaps reported their tips and accepted checks which it gave them for the differences between the minimum wages earned and the tips reported, claiming that this conduct on the part of the redcaps is conclusive as to their acceptance of the terms of the notice. The fact that the men reported their tips during the periods from October 24, 1938, through February 28, 1939, and from October 16, 1939, to the date of the filing of this suit, does not mean that in so doing they were agreeing to respondent's so-called accounting and guarantee arrangement. Furthermore, it cannot be said that in accepting checks for the differences between their tips and the minimum wage they agreed to the arrangement, because one may accept part of what is due him without impairing his right to collect the balance. Even if the reporting of tips and the acceptance of these checks from respondent might ordinarily be considered as evidence of the men's assent to the accounting and guarantee plan, the Court should not so find in a case where the parties are subject to the provisions of the Railway Labor Act because it is clear that it is the policy and purpose of that Act that employees not leave their employment and go out on strikes just because there may be a dispute between them and their employer, but rather that they remain on the job and attempt to settle their differences amicably. This was what both parties finally determined to do by leaving the question open for a decision by the courts, and with this understanding the redcaps remained in the employ of appellant. The fact that respondent kept a record of the tips, and paid the redcaps the difference between the tips and the minimum wage, is no evidence that respondent considered the accounting and guarantee plan in effect, because it has always been its position that tips are wages irrespective of agreement, and even on this theory it would owe the redcaps the difference between the tips and the minimum wages,

and it could not pay this difference without having the men report the amount of tips received by them.

On January 11, 1941, Judge Merrill E. Otis, sitting in the District Court of the United States for the Western District of Missouri, held against the redcaps employed at the Kansas City Union Station in a case somewhat similar to the case at bar, entitled, "George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, as representative of C. M. Barngrover et al., plaintiff, v. Kansas City Terminal Railway Company, a corporation, defendant," 36 F. Supp. 434, on the theory that they had accepted the terms of a notice served on them identical in form with the notice in this case. There was this important difference in the case, however, that the redcaps there made no protest whatsoever against the proposed accounting and guarantee plan such as the protest made by petitioner in this case by his letter of October 24, 1938. In referring to this case, Judge Otis noted this difference, saying:

> "A similar question **(but with facts differing in a material respect)** was presented to the District Court for the Northern District of Texas and decided by that court May 28, 1940, Pickett et al. v. Union Terminal Co., 33 F. Supp. 244." (Emphasis ours.)

We submit, therefore, that the accounting and guarantee notice did not become a part of the employment contract of the redcaps, both because there was never any meeting of the minds of the parties thereon, and because respondent could not by such unilateral action on its part effect a change in the existing employment contract without first exerting every reasonable effort to reach an agreement with the petitioner as the redcaps' representative as required by the Railway Labor Act.

III.

ON THE QUESTION AS TO WHETHER THE ACCOUNTING AND GUARANTEE NOTICE EFFECTED ANY CHANGE IN THE OWNERSHIP OF THE TIPS.

The Accounting and Guarantee Notice of October 22, 1938, Did Not Effect Any Change in the Ownership of the Tips Received by the Redcaps After That Date so as to Make Them the Property of Respondent, Which Could Be Used by Respondent to Pay Wages to the Redcaps.

We believe we have shown under point II, supra, that respondent's notice of October 22, 1938, referred to as the accounting and guarantee notice, did not become a part of the employment contract of the redcaps. But even if the Court should disagree with us on this point, we submit that the notice did not effect any change in the ownership of the tips, so that they became the property of respondent, and it might be said that respondent, by permitting the redcaps to retain the tips, was thereby paying the redcaps wages with its own money.

For the convenience of the Court we here set forth respondent's notice of October 22, 1938, omitting the address and signature:

> "In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the Station Master the amounts received by you as tips or remuneration for such services.
>
> "The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensa-

tion which, together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required."

In substance, this notice simply amounts to a statement by respondent which might be phrased as follows:

"Under the Fair Labor Standards Act we are required to pay you a minimum wage. This wage will be paid you by passengers who give you tips. You will inform us as to the amount of these tips, and if the passengers do not pay you sufficient tips to secure the minimum wage, we will pay you the difference,"

or perhaps it might be stated as follows:

"You are privileged to retain your tips as you have always done, but with this difference: We will credit the amount of said tips against the minimum wage which the law requires us to pay you, and if you do not receive sufficient tips to secure the minimum wage, we will make up the difference."

There is nothing in the notice stating that the men must turn over their tips. On the contrary, the notice specifically states that the men are privileged to retain their tips. The only limitation, in effect, sought to be made on this privilege was that the men must consider these tips

as part payment of wages so that the respondent would only have to make up the difference between the tips and the minimum wage. The representative of the carriers so interpreted the notice in the hearing before the Wage and Hour Division in the matter of the amendment of the record-keeping regulations, to which we refer under point IV, when he said:

> "The only change it proposed to make from the one that had been in effect all the years before was simply to add the element of a guarantee to these men. These men had been working all the years, generally speaking, for the tips they could get. The change that was proposed was to let them continue to do that, but add the one additional element of a guaranty to them that if they didn't make the minimum required by the law, the railroad would make it up to them."

Thus, in the final analysis, the accounting and guarantee arrangement devised by the railroads to evade their liability under the Fair Labor Standards Act is an attempt by them to write into the act a provision under which tips received from passengers are to be considered as wages paid by the railroads. Respondent, of course, will say that this is not its effect, contending that the arrangement is tantamount to the turning over of tips by the men to the amount of the minimum wage. The notice does not, however, as we have pointed out, so provide. Stated briefly, the notice is to the effect that "the carrier * * * guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided (that is, as tips) will not be less than the minimum wage provided by law," and that the men are "privileged to retain, subject to their being credited on such guarantee, all such tips or remuneration * * * except such portion thereof as may be required * * * for taxes." There is

not a single word in the notice about the men turning over their tips. The notice merely states that the carrier guarantees that the amount of tips reported, plus the sum paid by the respondent, will not be less than the minimum wage. In other words, respondent was merely expressing its opinion and belief that tips are wages which could be considered as received in partial discharge of the minimum wage required to be paid by the act.

The clear mandate of the law is that every employer shall pay to every employee wages at a given minimum rate per hour. The accounting and guarantee notice is not an agreement to pay a wage of any sort whatsoever, except as to the small difference between the minimum wage and tips reported, nor is it a notice from which an agreement between the employer and the employees could be inferred that the tips received by the employees should become the property of the employer. The notice at no place states that the employer claims ownership of the tips or gratuities which the employees might receive, but simply requires them to report the tips to the employer. The notice is nothing more than a contract of guarantee. It merely states that the redcaps shall, as in the past, be privileged to retain as their own such tips or gratuities as they receive from the traveling public, and that the respondent, instead of agreeing to pay a wage in accordance with the mandate of the law, guarantees to the employees that they will receive for their time spent at respondent's station from patrons of the station an amount equal to the minimum wage prescribed by law, but that if they do not receive from the patrons of respondent's station such an amount, respondent guarantees to make up any difference there might be. In so doing respondent has merely said to the employee: "You will get your money from the patrons of our station, and we simply guarantee that that which you get will not be less than a certain amount."

Respondent will likely cite the case of Harrison v. Kansas City Terminal Railway Company, 36 F. Supp. 434, in which Judge Merrill E. Otis, sitting in the District Court for the Western District of Missouri, rejected our construction of the accounting and guarantee notice, holding that the notice was an assertion by the defendant therein of ownership of the redcaps' tips. In speaking of an identical notice in that case, Judge Otis said (36 F. Supp., l. c. 439):

> "None seriously would contend that the redcaps did not understand that the defendant intended that after October 21, 1938, tips should be counted in the calculation of minimum wages to be paid as required by the Fair Labor Standards Act."

We do not dispute this statement; in fact, it is the construction of the notice for which we are contending, that is, that the terminal company wanted to include tips as wages paid by defendant. Judge Otis then says (36 F. Supp., l. c. 439):

> "None seriously would contend that the redcaps did not understand that the defendant by its announcement asserted rights to and an interest in tips received. It did that when it required that such tips should be reported daily (no employer would require an employee to report gifts in which the employer had no interest). It did that when it specifically made it known that tips were to be included in compensation guaranteed. Especially did it do that when it advised the redcaps that they were 'privileged to retain * * * tips.' To grant a privilege is to assert the right to grant it."

We do, however, dispute these statements. It is not true that no employer would require an employee to report gifts in which the employer had no interest, as it was essential that the tips be reported even though the employer claimed no interest therein, since it was claiming

that they were wages, and that it was only bound by the act to pay the difference between the tips and the minimum wage. It could not pay this difference unless it was advised of the amount of the tips by the daily reports of the redcaps. The requirement that the tips be reported is not the assertion of a claim of ownership of the tips. Nor is the statement in the notice that the redcaps were "privileged to retain * * * tips" inconsistent with our construction of the notice, and consistent only with an assertion by the employer of ownership of the tips. The redcaps had for many years in all railroad stations of the nation been permitted to retain their tips; this permission was not an assertion of ownership of the tips by the railroad companies, but, on the contrary, was a recognition of the fact that the tips were given to the redcaps by the traveling public and were not given to the railroads, and that consequently the tips were always the property of the redcaps. The mere statement in the notice that this privilege of retaining tips was to continue did not affect the existing situation one bit so far as the ownership of the tips was concerned; the ownership remained as before, that is, in the redcaps. Judge Otis says that the notice was an assertion by the defendant therein of a claim it had a right to assert, a claim to the tips received by the redcaps. While we have great respect for Judge Otis, we confess we are unable to find anything in the notice where the defendant therein asserts any claim to the ownership of the tips.

We respectfully submit, therefore, that the accounting and guarantee notice did nothing more than attempt to set up a system of reporting of tips by the redcaps in order that the respondent might be advised of the amount of the difference, if any, between the minimum wages earned and the tips reported, so that it could pay this difference, and thereby comply with the act as construed by it, that is, that tips were wages which it was entitled to credit against the minimum wage, being liable only for the defi-

ciency, if any, and that there is nothing in the notice whereby the respondent asserted any ownership of the tips, and nothing in the notice whereby the ownership of the tips was affected. The ownership of the tips, therefore, remained where it had always been, in the redcaps.

IV.

ON THE QUESTION OF WHETHER THE ACCOUNTING AND GUARANTEE PLAN WAS A COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT.

Congress, in Using the Language "Every Employer Shall Pay to Each of His Employees Who Is Engaged in Commerce Wages" at Certain Rates, Expressed Its Intention That a Direct Wage Payment Should Be the Means of Carrying Out the Purposes of the Act. Its Purpose Will Be Defeated If the Accounting and Guarantee Plan Is Held to Be a Compliance With the Act.

Respondent in the Circuit Court of Appeals relied on the principle that in the interpretation of statutes the duty of the Court is to construe the language so as to give effect to the intent of the law-making body, and that by applying this rule to the Fair Labor Standards Act of 1938, it may be said that the purpose of Congress in enacting said act was to guarantee to every employee engaged in commerce certain minimum earnings which Congress thought were required for the maintenance of a minimum standard of living necessary for health, efficiency and general well-being of workers, and that this purpose is accomplished fully as well if an employee receives the minimum earnings from tips, instead of through a direct wage payment from his employer. We, of course, do not want to be understood as contending that 25 cents received in tips will not purchase as much as 25 cents re-

ceived in wages, but we do say that Congress had the right to say what means should be employed to carry out the purposes of the act, and that Congress has said, and for very good reasons, that the purposes of the act can best be accomplished by a direct wage payment from the employer to the employee.

The purpose of the act may best be found in Section 2 thereof (Title 29, U. S. C. A., Section 202), which reads as follows:

> "Sec. 2. Congressional finding and declaration of policy.
>
> "(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) **constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce**; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> "(b) It is hereby declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." (Emphasis supplied.)

The labor conditions which bring about the evil results enumerated in subsection (a) of section 2, and which conditions Congress declared its purpose to eliminate are (a) low wages paid by certain employers, and (b) long hours

prevailing in certain employments. In this section Congress makes it clear that it considered wages below the minimum necessary to the maintenance of a decent standard of living an "unfair method of competition in commerce," and that this was one of the evil results which it intended to correct by the enactment of this measure. This purpose of Congress was recognized in the House Report on the Fair Labor Standards Act, being Report No. 1452, page 9, where the House Committee, to whom the bill was committed, said:

> "Collective bargaining efforts will be greatly strengthened by the power given to the Board to prevent competing chiseling employers from undercutting decent minimum wage standards or from stretching decent maximum hours standards."

Again, in its further report submitted April 21, 1938, being Report No. 2181, page 6, this Committee said:

> "No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors. No employee in any part of the United States in any industry affecting interstate commerce need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes."

Further, on page 7 of this report, in referring to section 2 of the committee amendment to the act, the report says:

> "Section 2 of the committee amendment contains a statement of the effect which the maintenance of substandard labor conditions exerts on interstate commerce. This finding is abundantly supported by the testimony of the joint hearings held on H. R. 7200 and S. 2475 during the first session of the Seventy-fifth Congress. The hearings indicate (1) that the maintenance of substandard labor conditions in a particular

industry by a few employers necessarily lowers the labor standards of the whole industry, and that this lowering of the standards is brought about by reason of the fact that the channels of interstate commerce have been open to goods produced under substandard labor conditions; (2) that the overwhelming majority of reputable employers consider competition in wages as an unfair and unconscionable method of competition in commerce; (3) that the maintenance of substandard labor conditions by the few employers referred to results in a downward spiral of wages in the industry with consequent dissatisfaction among employees in the industry which in turn results in labor disputes in the industry; and (4) that the States are unable to remedy the situation because goods which were produced under substandard labor conditions in one State may, protected by the failure of Congress to exercise its commerce power, flow freely into another State which attempts to maintain fair labor standards."

When all the evils which Congress endeavored to correct by the Fair Labor Standards Act are considered, it is easy to understand why Congress employed the particular language used in section 6:

> "**Every employer shall pay to each of his employees** who is engaged in commerce or in the production of goods for commerce **wages** at the following rates."

It is clear that Congress had in mind that in order to correct the evils listed as flowing from inadequate wages and excessively long hours, it was not only necessary to provide that each employee should receive for his services, an amount not less than that prescribed, but that such payment should be made by the employer in the form of wages. Congress did not mean to permit one employer to avail himself of the services of employees when paying such employees a wage below the standard prescribed, while his competitor in the same line of business was pay-

ing his employees the prescribed wage or more. To do this would, of course, defeat the act with respect to one of the things listed as an evil which the act was designed to correct.

The Court will take judicial notice of the fact that the "sweatshop" wages paid by employers in some sections of the country have heretofore disastrously affected wages and labor conditions in other sections. If an employer in one section can get free labor, he can sell his goods throughout the country at such a price as to force employers in competition to beat down wages, and thus bring on wage and hour controversies.

Congress expressly says that one of the evils it wished to correct by the enactment of this law was just that. It, therefore, says to employer A in Texas, "you must pay each of your employees in wages not less than a certain amount," and it says to employer B in Missouri, or some other state, the same thing. It says:

> "We recognize that to permit an employer to pay any employee wages less than a prescribed minimum, constitutes a method of unfair competition, and leads to countless labor controversies, and the resultant interference with commerce, and we, therefore, demand that each and every employer shall pay out of his funds, wages according to a certain standard."

From these conditions, it follows that to permit an employer to concoct any scheme or device through which he will get his work done for nothing, when an employer engaged in the same line of business pays the prescribed wage, constitutes an unfair method of competition and flies in the very teeth of this law.

That is exactly what the respondent in this case proposes to do. It has worked out a scheme through which it proposes to be relieved of the payment of practically any

wage whatsoever out of its funds, and to let other persons pay to its employees the amounts which the law requires should be paid by the employer itself.

The word "wage" has a definite well-understood meaning, that of a payment by an employer to an employee of compensation for work performed by the employee for the employer, and Congress must have used the word "wage" having in mind this meaning, and we submit that Congress did so in the exercise of its right to determine how the purposes of the act could best be effectuated; that Congress has said that they could best be effectuated by a wage payment made direct to the employee by the employer, rather than by a combination of tips from the public and wages from the employer, and that no court may say that the means laid down by Congress as most appropriate to the carrying out of its purpose may be disregarded.

We submit that when Congress said that every employer shall pay wages, Congress meant just this, no more and no less. It is true it might have said every employer shall pay wages, which, together with tips or gratuities received by the employee during the course of his employment, shall equal the minimum wage, but Congress did not see fit to do so, and we believe for very good and sufficient reasons. We believe that Congress in imposing the mandatory duty on the employer to pay the wage had in mind that this was the only way the law could be enforced without danger of evasion. We believe Congress by the language used intended to prohibit any such arrangements as the so-called accounting and guarantee plan in this case, which can so easily become the means of evading the obligations imposed by the act.

Sections 11 (a) and (c) of the act [29 U. S. C. A., Sections 211 (a) and (c)] are applicable here, and we therefore quote the pertinent parts thereof:

"Sec. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. • • •

"(c) Every employer subject to any provision of this Act, or of any order issued under this Act, shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder."

It will be seen that section 11 (c) of the act requires the employer to keep such records of the persons employed by him, and of the wages, hours and other conditions and practices of employment maintained by him, as shall be necessary for the enforcement of the provisions of the act, and that section 11 (a) gives the Administrator power to investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry subject to the act, and gives the Administrator power for that purpose to inspect the records kept by the employer.

The so-called accounting and guarantee system is subject to serious abuse, a factor which is properly considered in determining whether Congress intended that such system

might fulfill the statutory purpose. The records which the employer is required to make and preserve under section 11 (c) of the act are essential in order to determine whether the act is being violated. Respondent required the redcaps to report the tips received by them, and adopted and relied upon such reports in determining whether it owed the redcaps anything on account of its guarantee. Under such a plan no provision is made for determining how much the employees actually received in tips. The redcap can report without effective check by the Administrator or the employer the receipt of any sum whatsoever. If he feels it necessary to report the receipt of tips equal to or nearly equal to the minimum wage because of the fear that he may otherwise lose his job as an inefficient employee, he can do so, even though he received much less. This scheme, therefore, permits easy evasion of the minimum wage provisions of the act, and the provisions requiring that true and accurate wage records be made and kept. It is true that the redcaps represented in this case by petitioner have agreed in the agreed statement of facts filed herein that each of them received in tips or in tips and wage payments by respondent an amount at least equal to the minimum wages prescribed by the act, but in determining whether Congress had in mind permitting any such plan as the accounting and guarantee plan, however, we should not be confined to a consideration of whether the act has been evaded in this particular case, but whether the accounting and guarantee plan so easily lends itself to evasion of the act that Congress cannot be said to have had it, or any similar arrangement, in mind when it enacted that **every employer should pay** certain minimum wages.

In the spring of 1939 petitions were filed with the Administrator of the Wage and Hour Division of the United States Department of Labor by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express

and Station Employees, and other parties representing redcaps throughout the country, for an amendment to part 516 of the regulations issued by the Administrator under authority of Section 11 (c) of the Fair Labor Standards Act of 1938. A hearing was held before Gustav Peck, presiding officer, who heard the interested parties. It was proposed by the Brotherhood of Railway and Steamship Clerks that an amendment of the regulations be made so that wages should not include tips or gratuities received by employees of employers specified in section 13 (b) of the act from passengers or persons other than the employer. The Administrator decided that he did not have authority to make the amendment proposed, since he felt that the matter of whether tips were wages under the act was a matter to be determined by the courts, but he did amend the record-keeping regulations by requiring that a separate record be kept of wages paid by the employer, and of tips received by the employees. It appears from the findings and recommendations of the presiding officer at the hearing that careful consideration was given to the accounting and guarantee arrangement adopted by the carriers. We quote from the findings and recommendations of the presiding officer (4 Fed. Reg. 4252):

> "When the Fair Labor Standards Act was enacted, the carriers, according to their testimony, gave serious consideration to the problems raised by the Act to determine 'whether they could devise any way to avoid having saddled upon them an additional cost of operation of upwards of two million dollars per year' (365). While redcaps were admittedly their employees, they did not feel impelled to pay them 25 cents per hour out of pay roll funds. Instead the carriers instituted the 'accounting and guarantee' arrangement which they believed would meet the requirements of the law. Under this arrangement, each redcap is requested to report the amount of tips received every day. There is no change in the method

of compensation of redcaps; but if the total amount received from the public is less than 25 cents per hour the carrier agrees to make up the difference.

"This arrangement was designed to avoid as far as possible any payment to redcaps from the pay roll funds of the carriers. As the spokesman for the carriers expressed it:

> " 'The only change it proposed to make from the one that had been in effect all the years before was simply to add the element of a guarantee to these men. These men had been working all the years, generally speaking, for the tips they could get. The change that was proposed was to let them continue to do that, but add the one additional element of a guaranty to them that if they didn't make the minimum required by the law, the railroad would make it up to them' (369-370).

"Pursuant to this plan each carrier issued the following notice to its redcaps (or another notice similarly phrased):

(Here follows copy of accounting and guarantee notice.)

"In most instances copies of the notice were served personally upon each redcap and a receipt was required (89, 169, 175, 228). Verbal and written protests were made by some of the employees, but they were told that they must sign the receipts or cease working (82, 159, 160, 169, 204, 226-228, 239, 270-272). The record shows that in one instance the notice was posted on the bulletin board and no request was made that the redcaps employed in that station sign it (324-325).

"The contention of the Association of American Railroads is that these notices served upon the employees constituted enforceable contracts entered into as a condition of employment and resulting in a constructive turning over of tips to the employer and payment back to the employee.

"Results Growing Out of the Operation of the 'Accounting and Guarantee' Arrangement.

"Testimony offered at the hearing shows convincingly that the records kept by the carriers of tips reported as received by redcaps do not represent accurately the tips received by these men. Under the present minimum, redcaps must receive wages at the rate of two dollars for working an eight-hour day. The record is replete with statements that redcaps, unable to earn the minimum in tips during the day, falsely register that amount on the record slips provided by the employer (32, 57-63, 82-84, 161, 192). Numerous redcaps testified at the hearing that they padded their reports when they made less than 25 cents an hour in tips (192, 328). The reason for this false reporting of tips was said to be the fear of discipline or discharge by the carriers for failing to report the minimum (146, 161, 171, 177, 310-314). However, it appears to have become well-nigh the universal practice to report $2 each and every day, even in cases where the men have always received considerably more than $2 in the past; such falsification, initiated by the redcaps themselves and continued on the advice of their union officers, presumably on the ground that the railroads themselves are not interested in accurate records beyond the receipt of $2 per day (349), must have its basis in other considerations than the fear of discipline or discharge. The railroads have acquiesced in this practice.

"There was testimony that a station master told the employees to report 25 cents an hour regardless of whether the amount reported was actually earned (170). One witness testified that the station master in a large city had discontinued requiring the men to report and advised the redcaps that henceforth the railroad would report 25 cents an hour for the men (137). Witnesses testified that several of the redcaps were discharged for failing to report 25 cents an hour (160, 171). The record contains allegations that false reports of tips were made by redcaps from fear of dis-

cipline or the possible loss of employment, whether such fears were justified or not. On the other hand, the Association of American Railroads has submitted documentary evidence supported by affidavits to show that at many of the stations where these specific charges were made the railroads have repeatedly made up the difference between amounts reported by the men and the guarantee and that at these stations no reductions in the number of redcaps employed have been made as a result of the guarantee.

"The 'accounting and guarantee' arrangement by which most of the carriers compensate their redcaps is of necessity applied by minor company officials, local officers such as station masters, head porters, and station agents. It appears from the record that many of these officials have made it be known in one way or another that the redcaps ought to report the receipt of two dollars for eight hours work regardless of the amount actually received. The possible misapplication of the arrangement by subordinate officials is admitted by counsel for the Association of American Railroads in the following statement (392):

> " 'I have had personal experiences, and everyone else has had, of subordinate officers not carrying out strictly the intent of the instructions that they get from above, and I wouldn't be surprised to find that in some instances there have been actions of the sort that have been charged here, that is, certain men in immediate charge of these fellows, for fear of criticism by some one above them, indicated to these fellows what they wanted them to do.'

"The testimony substantiates this statement and fully demonstrates the impossibility of determining from the records of carriers kept to conform with the regulations of the Wage and Hour Division whether redcaps are receiving the minimum wage provided by the Act.

"Part 516 are Regulations and Records to be **Kept**

by Employers Issued Pursuant to Section 11 (c) of the Fair Labor Standards Act. The carriers appear to have taken rather lightly their own obligations to keep accurate records. In answer to a charge made at the hearing that 'redcaps are required to turn in slips showing checks of $2 in tips before they can go to work so that the records will be in shape' (137), the carrier replied in an affidavit that the slips of the redcaps 'are deposited in a box * * *. It may be that they are placing the report in the box before they complete their day's work. For this the company is not responsible' (Memorandum, Caption 5). This is a totally unwarranted assumption. It is the Company's obligation to keep accurate records under the law and the regulations and this shedding of responsibility, directly traceable to the 'accounting and guarantee' arrangement, is indicative of the lighthearted attitude taken by some of the officials of the carriers toward their obligation under the Act. In another terminal the form of the slip required to be filled out by the redcaps was changed after the Act was in effect five months and thereafter it did not even have a provision for reporting tips received. The Company alleges, however, that 'redcaps have specific instructions at the end of each pay roll period when they report to the auditor's office to pay Railroad Retirement Act taxes to report at that time if during the period they failed to receive in tips an amount equal to the sum they were entitled to receive under the Fair Labor Standards Act. It is generally understood by the redcaps that the Terminal Company will pay any difference upon redcaps reporting the amount necessary to meet the minimum requirements' (Memorandum, Caption 5). This is only another indication of the casual handling by subordinate officials of the obligations of the carriers under the Act. * * *

"Finding and Recommendation.

"In the light of all the evidence there can be no conclusion other than that the pay roll records of the

carriers for redcaps generally do not accurately record the data as to wages paid. It also appears that there is grave legal doubt as to the validity under the Fair Labor Standards Act of the accounting and guarantee arrangement which the carriers have used. It is, therefore, recommended:

"1. That the Division take immediate steps through court action to determine the validity of the accounting and guarantee arrangement under which many redcaps are employed.

"2. And, pending an authoritative court decision determining the validity of the accounting and guarantee arrangement, that employers be required to keep records which show separately from other amounts paid as wages, the amount of tips which are claimed by the employer to be wages paid.

"3. It is also desirable that records kept by employers for employees engaged in occupations in which tipping may occur shall record the number of hours worked each week in such tipping occupations separately from the number of hours worked in other occupations, if the employee accounts for or turns over to the employer the amount of tips received from third persons."

The fact that plans such as the accounting and guarantee plan in this case will lead to the defeat of the purposes of minimum wage legislation was forcefully pointed out in a paper written by Mary A. Anderson, Director of the United States Women's Bureau, United States Department of Labor, entitled "Tips in Relation to Minimum Wages," and published in the March, 1941, issue of The American Labor Legislation Review:

"Our second principle is that tips should not be counted as part of the legal minimum wage. For example, if $16 is established as the legal wage, the employer should not be permitted to pay the worker only the difference between the tips she receives and the minimum wage of $16. If the contrary policy

were followed, the employee would be required to report to her employer the amount of tips received each week in order that he in turn could know the amount of wages he must pay to make up the $16.

"If this practice were followed the purpose of the minimum wage law would soon be defeated. It would not be long before employers discovered which of their employees are costing them the most money. Obviously, the girls who received the least in tips would have to be paid the highest wages to make up the $16. Gradually the girls receiving low tips would be dismissed, whether efficient or not, and those with ability to wile larger tips from an irresponsible public would be employed in their places. The workers would be no slower than the employers in discovering the effects of the reporting system on their welfare. The dismissal of one or two workers would be sufficient to warn the others that if they were to retain their jobs their tips must equal those of their more fortunate co-workers. There is always one effective way out of a situation like this for the worker who is desperately in need of a job, and that is to report to her employer a greater amount of tips than she actually receives. The whole purpose of the minimum-wage law, that of guaranteeing the worker a living wage, would be defeated if this practice were permitted and the State authorities would be almost helpless to correct the situation."

It is true, as we have said, that the agreed statement of facts in this case shows that each redcap received in tips or wage payments from respondent an amount equal to or in excess of the amount of the minimum wages provided by the act. However, the fact that the accounting and guarantee plan may in certain cases result in the redcaps receiving in tips and wage payments an amount equal to the minimum wage does not eliminate the inherent vice of the plan.

The purpose of Congress to prevent labor disputes bur-

dening and obstructing commerce, and the free flow of goods in commerce, intended to be carried out by the requirement that the employer pay a decent minimum wage to his employees is not effectuated by the accounting and guarantee plan. In fact, it is obvious that this plan is apt to lead to serious labor disputes and to dissatisfaction on the part of those employees who are working under the plan. In this particular case the redcaps are discriminated against as a class, since other railway employees, such as dining car waiters and Pullman porters, who are paid a substantial wage by their employers in excess of the minimum wage required by the Fair Labor Standards Act, are permitted to retain their tips, while the redcaps under this arrangement must credit the tips against the minimum wage. The dissatisfaction of the redcaps with this system is evidenced by the filing of this suit, and other similar suits. A redcap who fails to earn the minimum per hour in tips becomes an unnecessary expense to his employer, and the employer can for legitimate business reasons discharge him. Redcaps who are unable to produce, and being fearful of probable discharge, will in all likelihood falsify their reports to indicate an income of at least the minimum per hour. This will create a situation which encourages dishonesty, and at the same time contravenes the fundamental provisions of the act in that such a man will be forced to subsist upon less than the minimum prescribed by the act. It will only be natural for the railroads to check up on the men and spy on them if they report a smaller amount in tips than the minimum wage. This will engender suspicion, bitterness and strife, and a system of checking, or even espionage, will be inaugurated. The act will thus increase rather than decrease conditions which are detrimental to the "general well-being" of the redcap, and will lead to "labor disputes burdening and obstructing commerce, and the free flow of goods in commerce."

We submit that it is evident that Congress could not have had in mind permitting any such arrangement as the accounting and guarantee plan devised by the railroads to evade the duty imposed upon them by the act to pay their employees wages. The law is plain; it says every employer shall pay each of his employees who is engaged in commerce wages at the minimum rates, and since it is plain, there is no occasion for construction. United States v. Missouri Pacific Railroad Company, 49 Sup. Ct. 133, 278 U. S. 269, 72 L. Ed. 322; Russell Motor Car Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778; Albert and J. M. Anderson Manufacturing Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778.

V.

ON THE QUESTION OF THE ABANDONMENT OF THE ACCOUNTING AND GUARANTEE PLAN BY RESPONDENT DURING THE PERIOD FROM MARCH 1, 1939, TO OCTOBER 15, 1939.

Even if the Court Should Hold That the Accounting and Guarantee Notice Became a Part of the Employment Contract of the Redcaps and That the Plan Was a Compliance With the Fair Labor Standards Act, the Plan Was Abandoned by Respondent During the Period From March 1, 1939, to October 15, 1939, During Which Period the Redcaps Were Instructed by Respondent Not to Report Their Tips, and Hence Petitioner Is at Least Entitled to Recover Wages and Liquidated Damages for This Period.

Even if this Court should hold that the accounting and guarantee plan became a part of the employment contract of the redcaps, and that the carrying out of the plan by respondent was a compliance with the Fair Labor Standards Act, petitioner is clearly entitled to recover the unpaid

minimum wages accruing to the redcaps during the period from March 1, 1939, to October 15, 1939, and liquidated damages in an equal amount, as the accounting and guarantee plan was abandoned by respondent during this period. The record shows that prior to March 1, 1939, respondent prepared and furnished to the redcaps a new form of time slip, and instructed them that commencing March 1st they would not be required to report the tips received by them, but would only be required to report the hours they worked each day (R. 130, 136). Even if it could be said, therefore, that by the accounting and guarantee notice, respondent asserted a claim to ownership of the tips, which we deny, this claim was completely abandoned on March 1, 1939, when respondent instructed the men that they should no longer report their tips. It is true that the respondent stood ready to pay the redcaps if they reported their tips had not equalled the minimum wage, but respondent would have been bound to pay this difference in any event without any agreement, even if tips are wages as a matter of law under the Fair Labor Standards Act.

VI.

ON THE QUESTION OF WHETHER TIPS ARE WAGES UNDER THE FAIR LABOR STANDARDS ACT.

Tips Received by an Employee Are Not Wages Paid by the Employer and May Not Be Considered in Determining Whether the Employer Has Complied With the Fair Labor Standards Act.

We believe we have shown that, in the absence of an agreement to the contrary, tips received by an employee in the course of his employment are his property and not the property of the employer, and that in this case the

respondent's accounting and guarantee notice did not effect any change in this ownership of the tips. If we are correct in our contentions we must next decide whether the language of the Fair Labor Standards. Act is such that the requirement of Section 6 of the Act that every employer shall pay each of his employees who is engaged in commerce wages at certain minimum rates may be so construed that tips received by an employee during the course of his employment may be included as wages paid by the employer in determining whether the employer has complied with the act. The determination of this question depends upon the construction of the language of the act, and particularly of Sections 6 and 3 (m) of the act [29 U. S. C. A., Sections 206 and 203 (m)]. The pertinent parts of Section 6 and Section 3 (m) read as follows:

> "Sec. 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rate—
>
> "(1) during the first year from the effective date of this section, not less than 25 cents an hour.
>
> "(2) during the next six years from such date, not less than 30 cents an hour."
>
> "Sec. 3 (m). 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."

The courts have defined "wages" as follows:

> "Both salary and wages are terms invariably used in defining the consideration which an **employer bestows upon** one who is serving him in consideration of his services, and is never applied in describing the gain, profit or recompense which accrues to one who

is conducting a business of his own and upon his own account." (Emphasis ours.)

Roberts v. Frank Carruthers and Bros. (Ky. 1918), 202 S. W. 659, 661.

"Wages is the reward agreed to be paid by the master to the servant or person whom he hires to do business for him." (Emphasis ours.)

Gay v. Hudson River Elec. Power Co., 178 F. 499, 503, citing Moore v. Heaney, 14 Md. 558.

"The word 'wages' means the compensation to a hired person for his services. This compensation may be a specified sum for a given piece of service, or a fixed sum for a given time of service."

Ford v. St. Louis etc. Ry. Co., 54 Iowa 728, 7 N. W. 126, 128.

"Wages in its ordinary acceptation has a less extensive meaning than salary. Wages is usually restricted to sums paid as hire or reward to domestic or menial servants, and to sums paid to artisans, mechanics, laborers, and others employed in various manual occupations, while salary has reference to the compensation of clerks, bookkeepers, other employees of like class, officers of corporations, and public officers."

Massie v. Cenna, 28 L. R. A. (N. S.) 1108, 239 Ill. 352, 88 N. E. 152.

"Wage means payment for services rendered, especially the pay of manual laborers receiving fixed pay for a day, week or month."

Colver v. Foster Screen Co., 99 N. J. Eq. 734.

"Wages is a compensation given to a hired person for his compensation agreed upon by the master to be paid to a servant."

La Juett v. Coty Machine Company, 272 N. Y. S. 822.

The term "wages," as distinguished from salary, is

commonly understood to apply to compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month, season or piece, but not by the job. The term does not include profits on the services of others, and it is not so broad as "earnings," which comprehends returns from skill and labor in whatever way acquired.

First National Bank of Wilkes-Barre v. Barnum, 160 F. 245.

In the case of Booker v. Pennsylvania Railroad Company, 82 Pa. Super. 588, a passenger sued for the value of a suit case lost through the alleged negligence of a redcap. The carrier, defending on the ground that the redcap was not an employee, but was the plaintiff's personal servant, offered in support of this position the contention that the redcap received no wage from the company. In passing upon that contention the Court remarked:

> "The money paid by the passenger was not compensation which the porter could have demanded or sued for in an action, but was rather a gratuity or tip which she was not bound to give and which the porter could not have recovered in an action of assumpsit if the passenger had not seen fit to give it. The fact that a traveler gives a tip to a porter for courteous service in the carriage of his hand luggage does not make the porter his servant for whose negligence he is responsible any more than a tip given to a bell boy in a hotel, to a waiter in a restaurant, or to a hat check employee, changes the status of their respective employment. Nor does the fact—if such is the case—that the railroad company does not pay its employees while they are 'portering only,' but that their sole source of revenue in such circumstances is the tips which they receive from passengers, negative the continuance of their employment while acting as porters or relieve the employer of responsibility for their acts within the scope of their employment."

The Pennsylvania Court in this case clearly pointed out the essential difference between tips and wages, for a tip is purely a gratuity which the passenger is not bound to give, nor the recipient entitled to compel, while wages are a fixed definite amount which the employee may recover from the employer.

The fact that Congress in using the word "wages" in the Fair Labor Standards Act intended it to have its usual meaning, which certainly does not include tips, is evident from the fact that in section 3 (m) of the act in stating what the word "wages" should include, Congress did not see fit to include tips or gratuities. Section 3 (m) provides that "wage" paid to an employee includes the reasonable cost as determined by the administrator to the employer of furnishing such employee with board, lodging or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees, but says nothing about tips or gratuities. Congress apparently was of the opinion that the meaning of the word "wages" was clear and did not include tips, and for that reason did not consider it necessary to exclude tips from the definition of wages. On the other hand, Congress did find it necessary under the Carriers Taxing Act of 1937, which requires an income tax to be paid by employees, and an excise tax to be paid by employers on **compensation** paid to an employee for services, to provide expressly that the term "compensation" should not include tips [45 U. S. C. A. 261 (e)]. Again under the Railroad Unemployment Insurance Act, which requires the employer to pay contributions on **compensation** paid by him, Congress found it necessary to define the term "compensation" so as to exclude tips [45 U. S. C. A. 351 (i)]. It is evident, therefore, that Congress, recognizing the fact that "wages" is a word of well defined and settled meaning, saw no need of defining it so as to exclude tips in the Fair

Labor Standards Act, while it did feel that the word "compensation" used in the Carriers Taxing Act of 1937 and the Railroad Unemployment Insurance Act, being of broader meaning, might be construed to include tips, and for that reason expressly provided that "compensation" should not include tips. On the other hand, when Congress wanted to include tips as wages in the Longshoremen's and Harbor Workers Compensation Act (33 U. S. C. 902, Mar. 4, 1927, c. 509, sec. 2, 44 Stat. 1424), it found it necessary expressly so to provide when it defined wages as follows:

> (13) Wages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, **and gratuities received in the course of employment from others than the employer.** (Emphasis supplied.)

Obviously, the word "wages" in ordinary everyday usage does not include tips, and if Congress had meant to include tips it would have so provided in section 3 (m) of the act, where it set forth what "wages" should include. The fact that Congress in section 3 (m) said that "wage" paid to an employee should include the reasonable cost to the employer of furnishing such employee with board, lodging or other facilities, but made no mention of tips, is a clear indication that Congress did not intend that tips received by an employee from third persons should be considered wages paid by his employer.

The language of Judge Otis in the case of Harrison v. Kansas City Terminal Railway Co., 36 F. Supp. 434, l. c. 437, is pertinent here on the question of whether Congress meant to include tips as wages:

"To say that, within the intention of Congress as

expressed in the Fair Labor Standards Act, the defendant paid wages to redcaps when it permitted them to accept tips from travelers, is to assume that Congress did not know the generally accepted meaning of simple words. But they did know the generally accepted meaning of simple words. They knew what the word 'wages' means in common, present day understanding. They knew what a 'tip' is. Certainly any member of Congress would have been amazed if he had been told, when he handed to the bellboy in his Washington hotel a tip, that the hotel company was paying the bellboy his wages. If Congress had intended that tips should be included in the meaning of the word 'wages' it would have said so."

Respondent relies on cases arising under the various workmen's compensation acts which have held quite generally that tips of an employee are to be considered in determining an employee's average weekly earnings in fixing the benefits due him. These cases, however, are not in point, because almost invariably the workmen's compensation acts use comprehensive language which includes all the earnings of an employee arising out of his employment, regardless of their source.

Thus, in the case of Lloyds Casualty Company v. Meredith, 63 S. W. (2) 1051, the Court of Civil Appeals of Texas said:

"Subsection 4 of Section 1 of Article 8309 of the Workmen's Compensation Act which provides that the average weekly wages of employees shall consist not only of the regular salary or wages paid, but also 'include the market value of board, lodging, laundry, fuel and other advantage which can be estimated in money' is broad enough to include tips."

It will be seen that the language of this section, as the Texas Court said, is broad enough to include tips. Other cases holding tips to be earnings under the various state

workmen's compensation acts are distinguishable from the case at bar because of their use of some broad language such as "earnings," instead of "wages." The English case of Penn v. Spiers and Pond, Limited, 1 King's Bench Law Reports (1908) 766, l. c. 769, in holding that tips were earnings within the English Compensation Act, said:

> "It has often been pointed out in this court that the measure of compensation under the Act is not wages but earnings * * * 'Earnings in the employment do not always come from the employer.'"

The workmen's compensation acts cases are not authority for construing the word "wage," as used in the Fair Labor Standards Act, to include "tips," as the language is not as comprehensive as the workmen's compensation acts. Thus Section 3 (m) of the Fair Labor Standards Act (29 U. S. C. A., Sec. 203) defines wage as follows:

> "Wage paid to an employee includes the reasonable cost, as determined by the administrator, to the employer of furnishing such employee with board, lodging or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees."

Obviously, the opportunity afforded by the employer of redcaps to receive tips entails no cost on the employer and certainly, if there is any cost, the tips received by the employee are not the measure thereof. There is no general language used in Section 3 (m) of the Fair Labor Standards Act, such as the word "advantage" used in the Texas statute, under which the opportunity to receive tips might justify their inclusion as wages.

The state minimum wage acts are silent as to whether tips are to be considered as wages, but by administrative rulings in those states where there are rulings, they have been excluded from the minimum wage required to be

paid. Thus, in California Order No. 12-A, covering hotels and restaurants, provides "no employer may include tips or gratuities received by employees designated under Section I hereof as part of the legal minimum wage fixed by said section of the order" (i. e., $16.00 a week). In Connecticut, by Order No. 5, pertaining to beauty shops, tips may not be counted as part of the minimum wage. In the District of Columbia the order governing public housekeeping made May 8, 1939, provides that "in no case shall gratuities or tips be included as any part of wages fixed under Paragraph 2 of this order," and the same provision is in the order applying to the beauty culture occupation made September 26, 1938. In Massachusetts the order on the retail store occupation provides that tips are not wages. In New Hampshire Mandatory Order No. 3, applying to the restaurant occupation, provides that tips are not part of wages. In New York Order No. 2, pertaining to beauty occupations, provides "in no event may tips be counted as part of the minimum wage." In Ohio Mandatory Order No. 3, applying to food and lodging occupations, provides "tips or other gratuities received by an employee shall not be considered wages under this order." In Oklahoma Obligatory Order No. 3, applying to the restaurant industry, states that "gratuities, gifts or tips constitute no part thereof" (i. e., of wages). Obligatory Order No. 5, applying to the hotel industry, contains the same provision. In Oregon the order pertaining to the public housekeeping occupation provides that "in no case shall gratuities be included as any part of wages." In Washington it has been ruled that tips are not wages.

In the following twenty-seven states the unemployment compensation acts specifically provide that tips shall be included in the definition of remuneration and wages: Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Louisiana, Mary-

land, Minnesota, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Washington. The fact that the legislatures of these states deemed it necessary to provide for an express inclusion would indicate that, unless they are expressly included, tips would not be considered a part of wages.

In those states where tips are not specifically included in the definition of wages under the unemployment compensation acts, and where there has been a ruling or regulation on the subject, the state authorities have ruled that tips are not deemed wages, namely, in California, Indiana, Iowa, Massachusetts, New Jersey and Oregon. Thus, in California, tips are not deemed wages. Department of Employment Rule 8.13, 1939 CCH Unemployment Insurance Service, Paragraph 5008.13. In Indiana tips are not wages. Indiana Unemployment Compensation Board Regulations 610, 1939 CCH Unemployment Insurance Service, Paragraph 6170. In Iowa tips are not considered a part of wages. 1939 CCH Unemployment Insurance Service, Paragraph 1230. In Massachusetts tips are not wages. Unemployment Compensation Commission, official interpretation 2 (9), 1939 CCH Unemployment Insurance Service, Paragraph 8004. In New Jersey tips and other gratuities are not included as wages. Unemployment Compensation Commission Ruling I, 1939 CCH Unemployment Insurance Service, Paragraph 1201.03. In Oregon tips are not wages. Ruling 22, Unemployment Compensation Commission, 1939 CCH Unemployment Insurance Service, Paragraph 5022.

The Supreme Court of New Jersey, in Case No. 208 for the January Term, 1941, decided September 16, 1941, entitled "Alexander Hamilton Hotel Corporation, Prosecu-

tor, v. Board of Review of the New Jersey Unemployment Compensation Commission et al., Defendants," held that tips received by a waiter were not wages under the New Jersey Unemployment Compensation Act, which defined "wages" as "remuneration payable by employers for employment," and "remuneration" as "all compensation payable for personal services, including commissions and bonuses, and the cash value of all compensation payable in any medium other than cash." In its opinion the Court said:

> "Thus it is that the term 'wages' is categorically limited to the remuneration 'paid' or 'payable' by the employer to the employee for the latter's service. And the definition of 'remuneration' plainly is confined to such as has been 'paid' or is 'payable' by the employer. It is but fair to presume that, if more were within the intention of the lawmaking body, appropriate language would have been chosen to give expression to it."

In rejecting the holding of the Board of Review that tips should be included in the fixation of unemployment compensation benefits because, "while the tips were not paid directly by the employer, they were part of the remuneration resulting from the employment furnished by" the employer, and that since the parties adjusted "the wage scale in direct proportion to the amount of tips expected, the tips must be regarded as part of the remuneration for employment and not as mere gratuities," the Supreme Court of New Jersey said:

> "This is a misapprehension of the statute. We are enjoined to interpret and apply this enactment in accordance with the expressed legislative will, rather than some supposed unexpressed intention — even though, in the view of the interpretative authority, that would be more in consonance with reason and justice. **Where the terms employed to declare the legislative purpose are clear and precise, and are not of**

> **doubtful meaning, there is no room for construction.** The judicial function is to enforce the revealed object as so delimited." (Emphasis ours.)

Judge Atwell in the case at bar applied the same rule in holding that tips were not wages under the Fair Labor Standards Act, saying (R. 279):

> "So that one would be drifting without an excuse to seek to attempt to read into this statute something that is not in it. **There is no ground for construction.** It is plain, and says what shall be done and what shall not be done." (Emphasis ours.)

We understand that the accounting and guarantee plan is based on a ruling of the Bureau of Internal Revenue under the Social Security Act appearing in Internal Revenue Bulletin 1938, No. 25-940.1 The Bureau of Internal Revenue in this ruling answered the following question:

> "If a hotel or restaurant guarantees its waiters a fixed income consisting partly of remuneration paid by the restaurant and partly by tips, does such a guarantee affect the status of the tips received by the waiters?"

The Bureau's answer was:

> "Inasmuch as the employer bases the remuneration of the employes on the amount of such tips and since the employes must inform the employer of the amount of tips received in order that the latter may compute the balance due the employes, it is clear that such tips constitute wages within the meaning of Titles 8 and 9."

This ruling, however, is no authority for the legality of the railroads' accounting and guarantee plan. In the first place, the definition of wages in the Social Security Act differs greatly from the meaning of the term "wages" as used in the Fair Labor Standards Act. Thus Section 811 of Title 8 of the Social Security Act in effect at the time of the above ruling read:

"(a) The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash,"

and section 907 read:

"The term 'wage' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash."

The term "remuneration for employment" is obviously broader than the term "wages," and might properly be said to include tips. The Fair Labor Standards Act, however, imposes the duty on the employer to pay **wages.** The above ruling of the Bureau of Internal Revenue did not, of course, consider any minimum wage law since the hypothetical arrangement was purely contractual, and the ruling is entitled to no weight in determining whether the requirements of a minimum wage act under which an **employer** is bound to pay a certain minimum **wage** may be met by the employer requiring the employee to pay the greater part of that wage out of tips given him by patrons of the employer.

Decisions of the courts or rulings of administrative officers and agencies that tips may or may not be included as wages for purposes of the workmen's compensation, unemployment compensation, or old-age pension laws are not of much value, however, under the Fair Labor Standards Act. These decisions and rulings are under statutes (such as the Social Security Act and Workmen's Compensation statutes) levying taxes to build up reserves of money benefits for industrial employees who become injured in the course of their employment, or become unemployed, or become superannuated. To effectuate the purposes of such statutes the courts properly construe "wages" to include tips, so that employees may be assured benefits based upon their real income. But the policy and language of the

Fair Labor Standards Act would not be served by any such construction.

We respectfully submit, therefore, that a fair construction of the language of the Fair Labor Standards Act leads to the conclusion that tips received by an employee from patrons of his employer may not be considered as payment of wages by the employer within the meaning of Section 6 of the Act.

VII.

ON THE QUESTION OF THE ACCOUNTING AND GUARANTEE PLAN VIOLATING THE INTERSTATE COMMERCE ACT.

Respondent's Argument That the Tips Received by the Redcaps Were Its Property Is Based on Its Contention That the Tips Were Its Charges to the Donors Thereof for Services Rendered Them by the Respondent Through the Redcaps. The Tips Cannot Be Considered Charges Made by the Respondent, Since They Are Not Uniform in Amount, and No Tariff Authorizing the Respondent to Receive the Same Has Been Filed With the Interstate Commerce Commission, and the Charge Would Be Unlawful Under Sections 2 and 6, Paragraph 7, of the Interstate Commerce Act (Title 49, U. S. C. A., Sections 2 and 6, Paragraph 7).

In its brief filed in the Circuit Court of Appeals respondent contended that the tips received by the redcaps were its property because the tips were the charges made by the respondent to the donors thereof for services rendered them by the respondent through the redcaps. It is obvious, however, that the tips were never meant to be charges because the tips were voluntarily given by the patrons, and they were under no compulsion to tip at all. Furthermore, the Court should not construe the tips as charges made by re-

spondent, as the Court would thereby necessarily hold that respondent was guilty of two violations of the Interstate Commerce Act, since under that act, if respondent is to charge for transportation service, all charges for similar service must be uniform, and no charge at all can be made unless a tariff is first filed with the Interstate Commerce Commission. Thus section 2 of this act (Title 49, U. S. C. A., Section 2) reads as follows:

> "Sec. 2. Special rates and rebates prohibited. If any common carrier, subject to the provisions of this chapter, shall, directly **or indirectly**, by any special rate, rebate, drawback, **or other device**, charge, demand, collect, **or receive** from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful." (Emphasis ours.)

Respondent's contention that by reason of the notice of October 22, 1938, the tips which passengers gave to the redcaps became a charge which respondent was making to the passengers for the service which it was rendering them through its employees cannot be sustained because such an arrangement is clearly unlawful under the plain terms of Section 2 of the Interstate Commerce Act, since it would be a device whereby respondent would receive from one passenger a greater or less compensation for the service rendered than it would receive from another passenger for a like service. As a matter of fact, some passengers did not tip at all, but, nevertheless, the redcaps were re-

quired to offer their services to all travelers, to the sick and poor as well as to the prosperous-looking, and to accept any amount offered as a tip by the passengers, and not to indicate by word or action any dissatisfaction with the amount.

The notice of October 22, 1938, cannot be construed as a contract on the part of the men to turn over their tips to the respondent because such an arrangement would be tantamount to the respondent making a charge for its service, and respondent has no right to make a charge for any transportation service without first filing with the Interstate Commerce Commission a tariff therefor. Section 6, Par. (7) of the Interstate Commerce Act [Title 49, U. S. C. A., Section 6, Par. (7)] reads as follows:

> "Sec. 6, par. (7). Transportation without filing and publishing rates forbidden; rebates, privileges. No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The Interstate Commerce Commission, in case No. 28,495, decided June 25, 1941, entitled "Ida M. Stopher v. Cincin-

nati Union Terminal Company, Inc.," held that redcap service was a transportation service, and that Section 6 of the Interstate Commerce Act required that a tariff be filed before a charge could be made by the defendant therein for redcap service. Respondent cannot now contend that the tips were charges made by it for redcap service without admitting that it has been guilty of a violation of this section of the Interstate Commerce Act.

VIII.

ON THE QUESTION OF WHETHER THE REDCAPS MAY WAIVE THEIR RIGHTS UNDER THE FAIR LABOR STANDARDS ACT.

Since Section 6 of the Fair Labor Standards Act Requires the Minimum Wages to Be Paid by the Employer, the Employee May Not by Contract Waive His Rights Under the Act and Agree That His Wages May Be Paid by Tips Which Are His Own Property.

The Circuit Court of Appeals in the Williams Case held (118 F. [2d], l. c. 327) that the Fair Labor Standards Act "undoubtedly contemplates that the employee shall be paid his wages by the employer out of the employer's funds." It is because respondent realizes this that it is necessary for it to argue that the tips were the property of the respondent, so that when it permitted the redcaps to retain the tips it might contend that they were retaining the respondent's money, and, therefore, the respondent was paying them wages out of its money. If, however, the tips were the property of the redcaps, as we believe we have shown, then it cannot be said that respondent paid wages to the redcaps by permitting them to retain their own money. If the tips were the property of the redcaps, then respondent has not complied with the Act, since it has paid the redcaps no wages out of its own funds;

unless the Court holds that the redcaps, by continuing to work after the accounting and guarantee notice was served on them, agreed that their tips, which were their property, would be accepted by them in lieu of a wage payment by respondent. Respondent cannot so contend, however, because such an agreement would be void and of no effect, as it would be an attempt to force the redcaps to waive the greater part, if not all, of the benefits given them by the act.

It has uniformly been held that an employee may not by contract waive the benefits of a minimum wage law. Thus, in the case of the City of Glendale v. Coquat, 52 P. (2nd) 1178, the Supreme Court of Arizona held that a municipal employee might not waive the benefits accorded by the Arizona Minimum Wage Act, saying:

> "As we have stated in several cases, the minimum wage law is not only meant for the establishment of individual private rights, but is a solemn declaration on the part of the state that, as a matter of public policy, it is interested in seeing that its citizens are protected in such rights. City of Phoenix v. Drinkwater, supra: State v. Jaastad (Ariz.), 32 P. (2nd) 799; State v. Anklam (Ariz.), 31 P. (2nd) 888. It is apparently universally held that where a right has been given to an individual not alone for his private benefit, but, as a matter of public policy, in the interest of the state, it may not be waived by anyone. Day v. McAllister, 15 Gray (Mass.) 433; Clark v. Spencer, 14 Kan. 398, 19 Am. Rep. 96; State v. Carman, 63 Iowa 130, 12 N. W. 691, 50 Am. Rep. 74; Recht v. Kelly, 82 Ill. 147, 25 Am. Rep. 301; Bosler v. Rheem, 72 Pa. 52; Branch v. Tomlinson, 77 N. C. 388; Clark v. State, 142 N. Y. 101, 36 N. E. 817; Larsen v. Rice, 100 Wash. 642, 171 P. 1037; Cato v. Crandel Cotton Mills, 132 S. C. 454, 129 S. E. 203, 41 A. L. R. 439."

Likewise in the case of Larsen v. Rice, cited in the Coquat case, the Supreme Court of the State of Washington held

invalid and unenforceable a contract whereby a woman employee agreed to accept less than the minimum wage per week fixed by the Washington Minimum Wage Act. The Court there stated:

> "But the controversy here had an added element not found in the ordinary controversy between individuals. It was not wholly of private concern. It was affected with a public interest. The state, having declared that a minimum wage of a certain amount is necessary to a decent maintenance of an employee engaged in the employment in which the respondent was engaged, has an interest in seeing that the fixed compensation is actually paid. The statute making the declaration not only makes contracts of employment for less than the minimum wage void, but has sought to secure its enforcement by making it a penal offense on the part of the employer to pay less than the minimum wage and by giving to the employee a right of action to recover the difference between the wage actually paid and such minimum wage. The statute was not, therefore, intended solely for the benefit of the individual wage earner. It was believed that the welfare of the public requires that wage earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wage earner, it must follow that any contract of settlement of a controversy arising out of a failure to pay the fixed minimum wage, in which the state did not participate, is voidable, if not void."

In Holden v. Hardy, 169 U. S. 366, 397, the Supreme Court said:

> "The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that **the proprietors of these establishments and their operatives do not stand upon an equality**, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are

> often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. **In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may promptly interpose its authority.**" (Emphasis ours.)

We have shown under point III, supra, that the accounting and guarantee plan, even if it became a part of the employment contract of the redcaps, which we deny, was no more than an agreement on the part of the redcaps to accept tips received from the traveling public as payment of wages by the respondent. If we are correct in our contention that the tips were the property of the redcaps, then the agreement of the redcaps to accept their own property in payment of wages due from respondent under the act would be a waiver of the benefits given them by the act, and would be wholly ineffectual under the foregoing authorities.

CONCLUSION.

Petitioner respectfully submits that the opinion of the Circuit Court of Appeals for the Fifth Circuit in this case is clearly erroneous in holding that the receipt and retention by the redcaps of tips given them by passengers was payment of wages by respondent; that the accounting and guarantee notice did not become a part of the employment contract of the redcaps both because of the absence of any meeting of the minds of the parties on the terms thereof, and also because respondent could not put such plan in operation without first complying with the Railway Labor Act; but that even if said notice did become a part of the employment contract of the redcaps, it did not effect any change in the ownership of the tips; that there being no

agreement to the contrary, the tips were the property of the redcaps, and the retention of these tips—their own property—by the redcaps was not payment of wages by respondent as required by Section 6 of the Fair Labor Standards Act; that, furthermore, the carrying out by respondent of the accounting and guarantee plan was not a compliance with the Fair Labor Standards Act because the purpose of said act will be defeated if said plan is permitted, because it so easily lends itself to evasion of the duties prescribed by the act; and that in any event tips are not wages under the plain terms of the act, and respondent had no right to consider them as such.

Petitioner, therefore, respectfully submits that the judgment of the Circuit Court of Appeals should be reversed, and the cause remanded with directions to affirm the judgment of the trial court.

Respectfully submitted,

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